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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, AND TRENTON-PHILADELPHIA COACH COMPANY,

AND

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT AND ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, AND CHARLES F. AND JANICE F. TROUTS,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

AND

CITY OF PHILADELPHIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The Philadelphia Transportation Company and its wholly-owned subsidiaries (PTC) and intervening stockholders, Joseph N. Janney, et al., pray that a petition for a writ of certiorari issue to review the final judgments or

decrees of the Supreme Court of Pennsylvania entered July 27, 1967, a timely petition for reargument having been denied on September 26, 1967, which judgments or decrees (1) affirmed the judgment and final decree of the Court of Common Pleas of Philadelphia County and (2) affirmed the subsequent preliminary injunction of the Court of Common Pleas of Philadelphia County restraining petitioners from instituting federal court proceedings.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania affirming the judgment and final decree of the Philadelphia court are reported at 426 Pa. 377, 233 A. 2d 15 (1967) and are printed as Appendix A in a separate Appendix volume filed herewith. The opinions of the Supreme Court of Pennsylvania affirming the subsequent preliminary injunction of the Philadelphia court are reported at 426 Pa. 418, 233 A.2d 35 (1967) (Appendix B). Previous opinions of the Supreme Court of Pennsylvania on an interlocutory appeal are reported at 419 Pa. 471, 214 A. 2d 632 (1965) (Appendix C). The opinions of the Court of Common Pleas of Philadelphia County are unreported. The opinion and decree nisi of the trial judge (Spaeth, J.) filed July 14, 1966, are printed as Appendix D. The opinion and final decree of the Court of Common Pleas *en banc* filed September 16, 1966, are printed as Appendix E. The opinion and preliminary injunction of the trial judge filed January 6, 1967, are printed as Appendix F.

JURISDICTION.

The final judgments or decrees of the Supreme Court of Pennsylvania sought to be reviewed were entered July 27, 1967, and timely petitions for rehearing therefrom were denied September 26, 1967. The jurisdiction of this Court to review the final judgments or decrees of the Supreme Court of Pennsylvania is invoked under Section 1257(3) of the Judicial Code of the United States (28 U. S. C. § 1257[3]).

QUESTIONS PRESENTED.

In a declaratory judgment proceeding brought by Southeastern Pennsylvania Transportation Authority (SEPTA), an agency of the Commonwealth of Pennsylvania, and the City of Philadelphia, against Philadelphia Transportation Company (PTC), a privately-owned public utility which operates and in large part owns the mass transportation system in Philadelphia, the Supreme Court of Pennsylvania, by a 4-3 decision with the Chief Justice and two of his associate justices dissenting, affirmed the final decree of a Philadelphia state court authorizing SEPTA to take over PTC's property for public use upon payment of a purchase price which, after deducting extraordinary financial obligations imposed upon PTC, would leave PTC and its 14,000 stockholders (residing throughout the United States) a maximum of $4,550,000 for their book value equity of $29,000,000 and their fair value equity of $123,000,000, in a company with annual after-tax earnings of approximately $3,000,000. The Supreme Court of Pennsylvania, which did not discuss in its opinion the constitutional issues, also affirmed, by a 4-3 decision, an injunction of the lower court restraining

petitioners from seeking an adjudication of their federal constitutional rights in a federal district court.

The following questions are presented:

1. May a state court, in direct conflict with the decision of this Court in *Donovan v. Dallas*, 377 U. S. 408 (1964), ignore the holding of this Court in that case "that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here," by enjoining parties in an *in personam* declaratory judgment action in a state court from establishing their federal constitutional rights in a federal district court?

2. Does not a state deprive a regulated privately-owned public utility corporation and its stockholders of their property without just compensation and due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by retroactively denying to it a fair and just rate of return on its capital investment, when a state court or other state agency requires the public utility to bear the expenses of future pension payments to its then retired employees (approximately $17,000,000) and, at the same time, takes the company's "fare box" asset or future income, where the company's rates are fixed by the state public utility commission, pursuant to state law, on the basis of treating pension payments to retired employees as current operating expenses in the year of payment with no provision having been made in rates for past years to fund such future payments?

3. Where a state agency seeks to acquire the property of a private corporation by exercising a perpetual purchase option assigned to it by a city which would result in a confiscatory purchase price (having no reasonable relationship to the value of the property taken) based upon an option

price formula exacted by the city in 1939 as a condition of the city's consent to the company's bankruptcy reorganization and the asset values of the property to be acquired are not the product of the grant of any franchise, privilege or right, shall the state be permitted, under the constitutional view of the Fourteenth Amendment today, to impose and enforce such an unconstitutional condition which will deprive the corporation and its stockholders of their property without due process of law?

4. Where a state agency, in concert of action with a city and pursuant to the authorization and decree of the state courts, seeks to circumvent a requirement of the statute under which it was created (that fair value be paid for property acquired by it whether in condemnation or through negotiation) by procuring from the city, without consideration, an assignment of the city's existing right to purchase all the assets of a privately-owned transportation company and exercises this option at a price which, as determined by the state courts, is grossly unfair and confiscatory, is not this, under the guise of exercising and interpreting a purchase option contract, in reality a condemnation or taking of private property for public use without just compensation and does not the state thereby deprive the corporation and its stockholders of their property without due process of law in violation of their constitutional rights under the Fourteenth Amendment to the Constitution of the United States, particularly under the following circumstances?

(a) All consideration of actual fair value of the property was excluded by the state courts, which rejected evidence that actual fair value exceeded book value by $94,000,000 even for the purpose of determining the reasonableness of their construction of the option phrase "the then undistributed corporate sur-

plus", thus restricting the price formula to book values based on historic costs (recorded under prescribed public utility accounting procedures) having no relation to present-day values.

(b) The phrase "the then undistributed corporate surplus" is further limited, by an untenable construction having no basis in state law, to "retained earnings", thus excluding, in addition to revaluation surplus reflecting appreciation, all other "capital surplus". This excluded from the purchase price "capital surplus" representing a book transfer of $5,000,000 from the capital stock to the capital surplus account resulting from a reclassification in 1955 of preferred stock with an aggregate par value which exceeded by that amount the stated value of the common stock into which it had been reclassified. There had been no distribution to stockholders or any change in book value. The full par value of the preferred stock (including the $5,000,000) was indisputably a part of the formula price prior to its reclassification.

(c) There is imposed upon the transportation company, whose properties were being taken over at the formula price, responsibility for the payment of all current liabilities, as well as the pension obligations referred to in Question 2, although the meaning of "surplus" (a factor in the option formula determining purchase price) was established by this Court in *Edwards v. Douglas,* 269 U. S. 204, 214 (1925), and by the Pennsylvania Supreme Court in *Branch v. Kaiser,* 291 Pa. 543, 549, 140 Atl. 498 (1928), and in statutes and accounting authorities of the time, to be "net assets of a corporation in excess of all liabilities including its capital stock." Thus, the company is forced to bear those liabilities twice.

(d) The state courts explicitly refused to consider accounting testimony as to the meaning of the term "undistributed corporate surplus" in its relationship to balance sheet terms and as to the proper accounting treatment of pensions.

(e) In the assignment of the purchase option by the city to another state agency the right specifically retained by the corporation to become a bidder for the right to purchase its property was ignored by the city, the state agency and the state courts preventing the company from protecting itself against what has become a confiscatory purchase price, notwithstanding the express reservation of its contractual right to do so. Moreover, a specific agreement made by the state agency and the corporation after the beginning of the action and with awareness of all the facts to extend the purchase payment date to January 1, 1967, if such purchase should eventuate, was changed by the state courts to a "reasonable" time "not less than six months" after final judgment.

5. Does not Pennsylvania's Metropolitan Transportation Authorities Act of 1963 violate the constitutional rights of a private corporation and its stockholders to just compensation and due process under the Fourteenth Amendment to the Constitution of the United States in that the statute, as construed and applied by the state courts, permits the acquisition by a state agency of the corporation's assets without regard to the fair value thereof and imposes upon the corporation the obligation of paying the pensions of retired employees not previously funded under prior state law?

6. Do not the facts and circumstances set forth in Questions 2, 4 and 5 constitute a violation by a state of the constitutional rights of a corporation and its stockholders

under the obligation of contract guarantees of Article I, Section 10 of the Constitution of the United States?

7. Does not the due process clause in the Fourteenth Amendment to the Constitution of the United States prohibit state agencies, in concert of action, from dealing unfairly with a private corporation to procure an agreement through which its property may be taken without just compensation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the Constitution provides in relevant part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article III, Section 2 of the Constitution of the United States provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

Article VI of the Constitution of the United States provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land and the Judges

in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

". . . the Members of the several State Legislatures, and all executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ."

Section 1331(a) of the Judicial Code, 28 U. S. C. § 1331 (a), provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The Constitutional provision and statutes of the Commonwealth of Pennsylvania which are directly involved herein are reported and cited as follows, by volume and page number of the official edition of the Pennsylvania statutes, and their pertinent verbatim text is set forth as indicated in the Appendix hereto:

Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P. L. 894, §§ 1-43, 66 P. S. §§ 2001-2043 (Appendix G);

Pennsylvania Constitution, Art. 17, § 9 (Appendix H);

Act of April 15, 1907, P. L. 80, § 1, 67 P. S. § 1256 (Appendix I);

Act of May 5, 1933, P. L. 364, Art. VII, § 701 (Appendix J);

Act of May 28, 1937, P. L. 1053, Art. III, § 301, as amended, 66 P. S. § 1141 (Appendix K);

Act of July 11, 1957, P. L. 711, § 703, 15 P. S. 2852-2-703 (Appendix L);

STATEMENT.

Southeastern Pennsylvania Transportation Authority (SEPTA) is a public authority organized pursuant to the Metropolitan Transportation Authorities Act of 1963 (SEPTA Act) of the Commonwealth of Pennsylvania (Appendix G) to provide and operate a regional mass transportation system in the City and County of Philadelphia and four adjoining counties. PTC is a privately-owned public utility corporation which presently operates and, in large part, owns the mass transportation system in Philadelphia. Janney *et al.* are stockholders who intervened in the state court proceeding.

In 1907, the City and Philadelphia Rapid Transit Company (PRT), PTC's predecessor, entered into a working agreement in which the City, in Section Eleventh thereof, reserved the right to purchase all the Company's assets, subject to all indebtedness, on July 1, 1957, or on any subsequent July 1, upon six (6) months' notice, for an amount equal to the par value of the then outstanding capital stock of PRT plus that of any additional capital stock issued with the City's consent (Appendix M).

In 1938, the Pennsylvania Public Utility Commission approved a Plan of Reorganization of PRT (to be renamed the Philadelphia Transportation Company (PTC)). Under the Plan of Reorganization, the preferred and common stock was converted into new shares with a sharp reduction in the par and stated values. This resulted in a tremendous loss to the stockholders and the Public Utility Commission expressly stated that it wished to benefit the stockholders by providing for a substantial capital surplus.

In order to consummate this Plan of Reorganization it was necessary to obtain the consent of the City to an amendment of the 1907 Agreement. The City's purchase option in Section Eleventh was amended in 1939 to read as follows:

"ELEVENTH: The City reserves the right to purchase all the property, leaseholds and franchises of the Company and its wholly-owned subsidiaries upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, **an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds** of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and **an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company.** The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its wholly-owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: PROVIDED, HOWEVER, That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised, the City shall succeed to and become the owner of all the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly-owned subsidiaries and the City may either

operate the same or lease the right to operate the same for such terms and upon such conditions as it may deem fit. The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right." (Emphasis supplied.)

As construed by the courts below, the 1939 amendment effected five major changes in the City's purchase option: (1) the City could purchase all the assets of the entire transportation system including what had theretofore been the valuable rights of underlying franchisees, (2) the City could now purchase all of PTC's assets free of all liabilities, (3) the City could exercise its option on any July 1 in perpetuity, not merely on July 1, 1957, and any July 1 thereafter, (4) the price was not dependent as under the 1907 Agreement on par value of the capital stock, but on four factors, including the par value of all outstanding preferred stock, $10 for each share of common stock and PTC's "then undistributed corporate surplus, if any", and (5) the City explicitly reserved its right to acquire petitioner's assets by condemnation.

In order to understand the operation of the option-price formula as amended by the 1939 Agreement, it should be noted that the factor of "the par value of all then outstanding preferred stock" of PTC, was eliminated by the complete reclassification in 1955, pursuant to PUC order, of PTC's preferred stock into common stock with a stated value of $10 per share. Because the par value of the preferred stock had been $5,000,000 in excess of the stated value of the common stock into which it was reclassi-

fied, this balance of $5,000,000 was transferred on PTC's books from capital stock to capital surplus. There was no distribution or change in the book value (Appendix N).

Also necessary to an understanding of the issues involved are the facts concerning PTC's pension obligations to those of its employees who would be retired as of the date of the exercise of the option. Before the trial court the parties stipulated that, as of December 31, 1965, the amount required to fund future payments to PTC's retired employees would approximate $17,000,000. Such payments by PTC have been consistently treated for rate-making purposes, as required under state public utilities law, by the Pennsylvania Public Utility Commission, as a current operating expense in the year of payment and no provision was made in rates for funding this obligation in any way. Not only did the PUC approve this treatment of pension obligations but the City Controller, who had the public duty to report on PTC's financial condition, never suggested that pension obligations should be charged against capital rather than against current income for the year of payment, until shortly before the option was exercised.

Section 4(d)(5) of the SEPTA Act (66 P. S. § 2004 (d)(5)) gave SEPTA authority to acquire property, as needed for its statutory purpose, by negotiated purchase, subject, however, to the restrictions of § 8(f)(24)(.1)(iii) (66 P. S. § 2008(f)(.1)(iii)) which governed SEPTA's power of condemnation. This latter section required SEPTA to pay "fair market value" for all property acquired with "due consideration" to be given any legal liability under any pension or retirement plan of any acquired businesses and also to assume the liability of such plans (Appendix G, pp. 238a, 264-5a).

Rather than comply with these provisions of Pennsylvania law (reflecting, as they do, requirements under the

state and federal constitutions) SEPTA and the City acted together to avoid the statutory requirement of fair market value by the City's assignment of the purchase option to SEPTA.*

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* The circumstances of the assignment were characterized by secrecy and unfairness. At the end of 1964 PTC and SEPTA were engaged in discussions relating to a negotiated purchase, which the City knew of and considered to be a problem to be worked out solely by PTC and SEPTA. (See letter of November 2, 1964 from a PTC director (John McShain) to the Mayor of Philadelphia (James H. J. Tate [Appendix O]). At the same time the City and PTC were engaged in discussions relating to extending the Broad Street Subway lease and to continuing license payments at the $560,000 annual rate provided for in the 1962 amendment to the 1907 Agreement. PTC agreed in December, 1964 to a six months' extension.

Because of the need for approval of City Council, the City was not ready to proceed to the actual execution of the six-month extension agreement until the beginning of February, 1965, and on February 2 the City sent PTC an unsigned draft of the agreement, the effective dates of which were January 1, 1965 through June 30, 1965. PTC signed the agreement on February 3 and sent it back to the City for execution. At that time the Mayor was away from the City on a winter vacation until February 25.

In the meantime, PTC and SEPTA had been unable to agree on a purchase price for PTC's assets. On February 17, 1965 in a private meeting between representatives of SEPTA and the City SEPTA requested the City to assign to it, without consideration, the City's purchase-option rights under the 1907 Agreement, as extended by the 1965 six-month Agreement, which had not yet been executed by the City. The City agreed, as requested, to assign its purchase option rights to SEPTA as soon as the execution of the 1965 Agreement was completed. No written record was made of this oral agreement of February 17, and both the City and SEPTA proceeded without disclosure to PTC; PTC never did in fact acquire knowledge of the plan until after the 1965 agreement had been fully executed.

On February 25, 1965, the same day Mayor Tate signed the 1965 Agreement, the City filed in the Office of the Clerk of City Council a proposed ordinance of which PTC had no prior knowledge, to authorize the City to assign to SEPTA, without payment of any consideration, the City's right to purchase the assets of PTC. The ordinance was passed by City Council and was signed by the Mayor on June 4, 1965. On June 8, 1965, the City executed a written assignment to SEPTA without consideration of the City's right to purchase PTC under the 1907 Agreement as amended.

On June 18, 1965, SEPTA, in combination with the City, commenced this declaratory judgment action in the Court of Common Pleas for Philadelphia County against PTC to enforce SEPTA's right to acquire PTC's assets under the City's purchase option.

PTC's objections to the Court's jurisdiction were overruled by Judge Spaeth of that court and his order was affirmed on an interlocutory appeal by the Pennsylvania Supreme Court, Chief Justice Bell dissenting. (*Southeastern Pennsylvania Transp. Authority v. Philadelphia Transp. Co.*, 419 Pa. 471, 214 A. 2d 632 (1965) [Appendix C]).

Settlement discussions were renewed and resulted in an agreement which was rejected by PTC's stockholders. The only portion of that agreement which survived the rejection was a provision that the date of purchase was extended to January 1, 1967 (Appendix p. 174-5a). Judge Spaeth, stating that he was compelled to conclude the case by July 15, 1966, held hearings from May 16 through June 3, 1966, which produced a trial transcript of over 2400 pages and over 80 exhibits, with an additional 500 pages. Judge Spaeth required the parties to submit their requests for findings of fact and conclusions of law, briefs, and argument by June 28, 1966. He heard oral argument on that date and on July 14, 1966, 16 days later, he rendered his Opinion, Findings of Fact, Conclusions of Law and Decree Nisi of over 157 pages, prefaced by a short "Abstract of the Case" intended for public consumption (Appendix pp. 45-190a).

Over 20 pages of Judge Spaeth's opinion on the final decree are spent in describing the evils of private ownership of public transportation facilities in the City of Philadelphia prior to the 1939 Agreement (Appendix pp. 54-79a). This history does not touch upon PTC's development of such facilities since 1939. At the trial of

the action Judge Spaeth refused to accept any proof as to the actual value of PTC's assets in determining the application of the term "undistributed corporate surplus" (Appendix p. 146a). He found instead that the phrase "undistributed corporate surplus" should be construed to refer only to undistributed but normally distributable earned surplus, or "retained earnings" as stated in the books and balance sheets of PTC. He thus eliminated from the price formula approximately five million dollars of capital surplus resulting from reclassification of preferred stock into common stock (see pp. 12-13, *supra*), as well as "revaluation surplus" which might result from stating PTC's assets at their fair market value instead of book value. Worse, he concluded that SEPTA took the assets free of all liabilities, including the obligation to make pension payments in the future to PTC's retired employees. He held that the trial testimony as to accounting terms and methods was irrelevant in interpreting and applying the terms of the purchase price formula in the 1907 and 1939 Agreements, although he reduced the term "undistributed corporate surplus" to the balance sheet item of "Retained Earnings" (Appendix pp. 145-63a). Finally, he held that the date of purchase could be indefinitely postponed, at SEPTA's option, from the agreed date of January 1, 1967, to at least six months after the action is concluded without the possibility of any further appeal (Appendix pp. 174-76a).

The effect of Judge Spaeth's decision is that SEPTA may acquire all of the assets of petitioners, of which petitioners attempted to prove the physical properties alone had a fair value of from $162,000,000 to $171,000,000 after depreciation, for a net payment to PTC's stockholders of $4,547,207 for their total investment. This latter figure is derived from the December 31, 1965, balance sheet figures

which would indicate a price, according to the courts' construction of Section Eleventh, of $51,656,860. The secured debt of PTC, however, which is included in the option price formula, was estimated to be $27,628,332 (Ex. P-36), other obligations of PTC imposed by the Court on PTC total $17,504,377 (Ex. D-44) and the estimated cost of funding future pension payments is approximately $16,911,696 (Ex. D-44). These obligations of PTC exceed the purchase price by $10,387,185 but Judge Spaeth indicated he would permit PTC to discharge current liabilities out of current assets, including cash and perhaps marketable securities (Appendix p. 171a). Thus, using 1965 balance sheet figures, PTC's sole assets would be reduced upon the forced sale to SEPTA to a maximum of $4,547,207. PTC's after-tax earnings in 1965 were $2,949,533 (Ex. D-44).

Subsequently, on January 6, 1967, Judge Spaeth rendered an opinion (Appendix F) and a "preliminary injunction" which enjoined petitioners and all other defendants from, *inter alia:*

> "filing, or inducing others to file, in any State or Federal Court, any lawsuit that will in any way affect the jurisdiction of this Court, the appellate jurisdiction of the Supreme Court of Pennsylvania, or the subject matter of this litigation, other than taking any action in the Supreme Court of Pennsylvania to review any action or decision of this Court . . ." (Appendix p. 231a)

The Pennsylvania Supreme Court affirmed by an identical four-to-three vote (Chief Justice Bell and Justices O'Brien and Roberts dissenting) both the declaratory judgment and the preliminary injunction. The opinion of the Court concerning the declaratory judgment was "merely a

highlighting'' of Judge Spaeth's opinion and, like his, ignored petitioners' constitutional claims (426 Pa. 377, 382, 410, 233 A. 2d 15, 18, 31 [1967]).

The federal constitutional questions raised in this Petition were timely and properly raised by petitioners. They were first raised in requests for findings of fact and conclusions of law made to Judge Spaeth (See Appendix P, pp. 311-13a), and argument was made in support of those requests. Petitioners filed exceptions to his failure to adopt those findings and conclusions (See Appendix P, p. 312-13a) and fully argued the federal questions in their brief and orally before the Court of Common Pleas *en banc* (Appendix R, p. 322a-35a). The exceptions were dismissed by the Court of Common Pleas *en banc* (Appendix E). These constitutional questions were among the ''Questions Presented'' to the Pennsylvania Supreme Court and were fully argued both in petitioners' briefs and in oral argument before that Court (Appendix S). In the case of the preliminary injunction, PTC contended before the injunction was issued that the state court had no power to issue such an order under this Court's decision in *Donovan v. Dallas,* 377 U.S. 408 (1964). Judge Spaeth considered this decision but issued the injunction in spite of it (Appendix F, p. 225a-26a). This question was also raised in PTC's brief before the Pennsylvania Supreme Court (Appendix Q, pp. 316-321a). The Supreme Court of Pennsylvania rejected these contentions. The constitutional questions were renewed in petitioners' petitions for reargument which the Pennsylvania Supreme Court denied. The foregoing matter is discussed more fully in Appendix P, pp. 311-15a.

REASONS FOR GRANTING THE WRIT.

A. The Order Enjoining a Federal Suit Is In Direct Conflict With a Decision of This Court.

In direct conflict with and disregarding the decision of this Court in *Donovan v. Dallas,* 377 U.S. 408 (1964), that state courts have no power to enjoin federal court proceedings, the Supreme Court of Pennsylvania affirmed without comment, by a 4-3 vote, a "preliminary injunction" of the lower state court restraining petitioners from litigating their federal constitutional rights in a federal district court. Judge Spaeth issued the "preliminary injunction" in the purported belief that it was distinguishable from the final injunction in *Donovan* which was issued after the state court appellate process had been completed.*

In fact, however, this case is completely governed by *Donovan.* There this Court reversed an injunction barring

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* The judgment or decree of the Supreme Court of Pennsylvania affirming the preliminary injunction is a "final judgment or decree" within the meaning of § 1257 of the Judicial Code. A state court may not avoid immediate review of an invalid injunction by terming it "preliminary", e.g., *Richfield Oil Corp. v. State Bd. of Equalization,* 329 U. S. 69 (1946), and the question of "finality" under § 1257 is, of course, one of federal law which may not be distorted by state court procedures. *Pope v. Atlantic Coast Line R. Co.,* 345 U. S. 379 (1953). In *Local 438, Constr. & Laborers' Union v. Curry,* 371 U. S. 542 (1963), this Court held that where a state court granted a preliminary injunction which was totally beyond the court's power under federal law, the determination of that question was immediately reviewable by this Court, particularly when to postpone review "would seriously erode" the jurisdiction of a federal agency as an independent forum, not subject to the processes of state courts and state law (371 U. S. at 550). Here, as in *Curry,* there are very important reasons for immediate review of this question. It would be a temptation to any state court to grant a preliminary injunction against a federal court action if this Court held that by doing so the state court would defeat federal jurisdiction through the otherwise valuable policies embodied in the rules of *res judicata.*

plaintiffs and others in an action in the Texas courts from prosecuting a subsequent action in a federal court concerning the right of the City of Dallas to build an additional airport runway and from issuing and selling municipal bonds for that purpose. In *Donovan* the Texas Supreme Court ordered that the plaintiffs in the state court be enjoined from prosecuting a separate, subsequent federal court action and the state court held them in contempt both for attempting to prosecute the existing suit and for instituting a new suit in the federal court to enjoin enforcement of the state court order. This Court reversed the contempt conviction, holding that in the case of *in personam* actions state courts have no power to enjoin federal court proceedings. This ruling therefore clearly applies to both existing proceedings and to those brought after issuance of the state court order.

The preliminary injunction has deprived petitioners of due process by denying them their right of timely access to a federal court.*

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* This right of access to a federal court is based on fundamental constitutional principles which prohibit state courts from enjoining a party from resorting to the federal courts. Article VI of the Constitution of the United States binds judges of every state to recognize the supremacy of the Constitution of the United States and the laws enacted by Congress under the Constitution. Article III, Section 2, provides that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and the laws of the United States. Congress has given the United States District Courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. This grant of power creates a federal right in every citizen to invoke that power.

As the Supreme Court said in *Donovan*, the right to pursue "federal-court remedies" is a right "granted by Congress and cannot be taken away by the State," and state courts are "without power to take way this federal right by contempt proceedings or otherwise." *Donovan v. City of Dallas*, 377 U. S. 408, 413-414 (1964). The right to invoke federal court remedies is a right protected by the United

The relief to be granted. The priority in time of the state court judgment over any judgment which petitioners may now obtain in a federal court is the fruit of an unconstitutional denial to petitioners of their right to timely access to the federal courts. To permit that judgment to bar proceedings in a federal district court on the basis of *res judicata* would totally defeat petitioners' constitutional rights.

The denial of petitioners' right to timely access to the federal district court during the pendency of the state court action therefore makes necessary some action by this Court beyond reversal of the lower court's injunction. It is suggested that this Court may grant certiorari as to the injunction while deferring any action on this Petition as to the other points raised pending further developments in the federal court suit now pending in the Eastern District of Pennsylvania.* Petitioners will then have an opportunity to establish their federal rights in the United States District Court. The opinions of the judges in the lower federal courts based on a proper record will be of substantial assistance in determining the merits of petitioners' federal claims.

States Constitution. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532 (1922); *Railway Co. v. Whitton's Administrator*, 13 Wall. 270, 286-287 (1871). In *Garrity v. New Jersey*, 385 U. S. 493 (1967), the Supreme Court characterized this right as one of those "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." 385 U. S. at 500.

* On December 15, 1967, after the denial by the Pennsylvania Supreme Court on September 26, 1967 of the petitions for reargument of its affirmance of the trial court's decrees, PTC commenced an action against SEPTA and the City in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 44348) seeking a declaratory judgment under the Federal Declaratory Judgment Act adjudicating PTC's constitutional claims.

As to any suggestion of mootness, see *Liner v. Jafco, Inc.*, 375 U. S. 301 (1964). This Court should also note that the majority of the Pennsylvania Supreme Court rejected the dissenters' view that the injunction is moot. (Appendix B, p. 41a.)

B. The Pension Obligation Imposed Here by a State Upon a Public Utility Being Divested of Its Revenue-Producing Assets Retroactively Deprives It of a Fair Rate of Return on Its Investment and Raises a Constitutional Issue of Public Importance.

The imposition on PTC by the state courts of the responsibility for making future pension payments to presently retired employees produces a retroactive deprivation of a fair rate of return on PTC's investment.* By reason of its separation from the operating transportation system and its revenues, PTC no longer has the current income from those revenues, i.e., the "fare box", to use for the payment of those pensions. As stated by Mr. Justice Roberts of the Pennsylvania Supreme Court in his dissenting opinion:

> "The Court's treatment of the $17,000,000 pension obligation . . . retroactively compels PTC to utilize past earnings in order to pay for future obligations."

The courts, public utility commissions and state legislatures have consistently required that pension obligations be treated as current operating expenses in the years of

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* The right of PTC to a fair rate of return is well established.

> "'. . . [T]he action of the state officials in the totality of its consequences "must be" consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation.'" *United Gas Pub. Serv. Co. v. Texas*, 303 U. S. 123, 143 (1938), quoting from *West Ohio Gas Co. v. Public Util. Comm.*, 294 U. S. 63, 70 (1935).

This right cannot be defeated by indirect means. A judicial or quasi-judicial proceeding of a governmental court or agency may not collaterally and retroactively redetermine the reasonableness of rates and charges already established by legislative ruling, *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370 (1932), or by default in such ruling, *Forbes Pioneer Boat Line v. Bd. of Comm'rs.*, 258 U. S. 338 (1922).

payment and hence included in the rates for those years.* PTC's rates were fixed on that basis. They contain no ele-

* *Pittsburgh v. Pa. P. U. C.*, 370 Pa. 305, 88 A. 2d 59 (1952); *PUR Digest, Expenses* § 49; *Alabama P. S. C. v. Southern Bell Teleph. Co.* 253 Ala. 1, 36-9, 42 So. 2d 655, 686-9, 84 PUR (NS) 221, 260-4 (1949); *Pacific Tel. & Tel. Co. v. Cal. P. U. C.*, 62 Cal. 2d 634, 401 P. 2d 353, 58 PUR 3d 229, 254 (1965); *Southern Bell Teleph. Co. v. P. S. C.*, 203 Ga. 832, 874-5, 49 S. E. 2d 38, 64, 75 PUR (NS) 471, 503-4 (1948); *Central Maine Power Co. v. Maine P. U. C.*, 150 Me. 257, 109 A. 2d 512, 7 PUR 3d 1 (1954); *New England Teleph. & Teleg. Co. v. Mass. Dept.*, 331 Mass. 604, 121 N. E. 2d 896, 6 PUR 3d 65 (1954); *State v. Tri-State Teleph. & Teleg. Co.*, 204 Minn. 516, 284 N. W. 294, 28 PUR (NS) 158 (1939); *Nevada P. S. C. v. Ely Lt. & Power Co.*, 393 P. 2d 305, 55 PUR 3d 123 (1964); *New Jersey Bell Teleph. Co. v. Bd. of P. U. Comm'rs*, 12 N. J. 568, 97 A. 2d 602, 100 PUR (NS) 379 (1953); *Columbus v. P. U. C.*, 154 Ohio 107, 134, 93 N. E. 2d 693, 707 (1950); In re *Northwestern Bell Tel.*, 73 S. D. 370, 391-2, 43 N. W. 2d 553, 564, 85 PUR (NS) 368, 384-5 (1950), cert. den. sub nom. *Farmers' United Educ. & Coop. v. Northwestern Bell Teleph. Co.*, 340 U. S. 934 (1951); *Southern Bell Teleph. Co. v. Tenn. RR & P. U. C.*, 74 PUR (NS) 150 (Tenn. 1948); *Norfolk v. Chesapeake & P. Tel. Co.*, 192 Va. 292, 64 S. E. 2d 772, 89 PUR (NS) 33 (1951); In re *Petition of New England Teleph. & Tel. Co.*, 116 Vt. 480, 488-9, 80 A. 2d 671, 677-83, 90 PUR (NS) 414, 420-8 (1951); *State ex rel. Pacific Tel. v. Dept. P. S.*, 19 Wash. 2d 200, 252-9, 142 P. 2d 498, 523-7, 52 PUR (NS) 6, 42-8 (1943); *Chesapeake & P. Teleph. Co. v. P. U. C.*, 62 Wash. Law Rep. 486 (Sup. Ct. D. C.); Re *Mississippi River Fuel Corp.*, 63 PUR (NS) 89 (F. P. C. 1945); Re *Western U. Teleg. Co.*, 25 PUR 3d 385 (FCC 1958); Re *Southwestern Bell Teleph. Co.*, 87 PUR (NS) 97 (Ark. 1951); Re *Southwestern Bell Teleph. Co.*, 93 PUR (NS) 161 (Kan. 1952); *Ex parte Southern Bell Teleph.*, 79 PUR (NS) 33 (La. 1949); Re *Chesapeake & P. Teleph. Co.*, 70 PUR (NS) 97 (Md. 1947); Re *Michigan Bell Teleph. Co.*, 85 PUR (NS) 327, 335 (Mich. 1950); Re *Southwestern Bell Teleph. Co.*, 77 PUR (NS) 33, 44 (Mo. 1949); Re *Great Falls Gas Co.*, 29 PUR 3d 237 (Mont. 1959); Re *New England Teleph. & Teleg. Co.*, 30 NHPSCR 266 (N. H. 1948); In Re *Uniform System of Accounts*, 82 PUR (NS) 161 (N. Y. 1950); Re *Norfolk & Carolina Tel. Co.*, 8 PUR 3d 65 (N. C. 1955); In Re *Puerto Rico Teleph. Co.*, 55 PUR 3d 1 (P. R. 1964); Re *New England Teleph. & Teleg. Co.*, 83 PUR (NS) 161, 187 (R. I. 1949); Re *Wisconsin Teleph. Co.*, 80 PUR (NS) 482 (Wisc. 1949); Re *Mountain States Teleph. Co.*, 14 PUR 3d 230 (Wyo. 1956). The Pennsylvania Public Utility Commission, and the City until 1964, have uniformly so considered them. Thus there was no suggestion that the 1939 balance sheet should show any pension liability in reduction of PTC's undistributed corporate surplus.

ment for funding of pension payments in the future. As a consequence, when PTC stockholders are burdened with those future pension payments, the payments must come first out of past earnings, then capital surplus and finally out of the capital stock account itself. The result here was to deprive PTC of all its past earnings, all its capital surplus and a substantial part of its capital, as was pointed out in the dissenting opinion of Mr. Justice Roberts of the Pennsylvania Supreme Court (concurred in by two of the other six justices).*

Proper accounting treatment of pension plans of public utility companies regulated as to rates is consistent with this analysis. Under applicable accounting principles such a company which has treated pensions on a pay-as-you-go basis may either omit the liability on its balance sheet, with an explanatory footnote, or, if it states the obligation as a liability, may reflect as an asset the right to receive the equivalent amount out of future revenues. The state courts said this testimony was not relevant. It did not require that the liability be set up on the balance sheet, but instead,

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* "Perhaps the most inequitable aspect of the Court's disposition is its saddling PTC with the obligation of paying future pension rights due its retired employees, thereby depriving PTC's stockholders of approximately $17,000,000. As a result the amount they will actually receive for their stock will be considerably less than the $10.00 per share envisioned by the 1939 formula. Indeed the amount required to meet the pension fund obligation is practically equal to the amount received in exchange for PTC's stock. Thus the effect of the disposition on this aspect is to wipe out entirely Item 3 of the option formula." 426 Pa. 377, at 410.

"Thus I believe the Court's treatment of the $17,000,000 pension obligation is doubly burdensome. First, it retroactively compels PTC to utilize past earnings in order to pay for future obligations. This is not only contrary to the manner which PTC, with the express approval of the City and the P. U. C., has in the past treated said obligations, but also contrary to the intent of the 1939 agreement itself." 426 Pa. at 414.

without foundation in the agreement, imposed the obligation on PTC and relieved SEPTA of responsibility.

The pension issue in this case is one which arises whenever a private public utility company whose rates are regulated is taken over by an authority. Acts creating such authorities often provide for the assumption of those liabilities by the authority and, in some cases, that the liability be taken into consideration in determining the value to be paid upon condemnation or acquisition.*

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* Many state statutes, including Pennsylvania's SEPTA Act, require state authorities to assume the pension obligations of public utilities when they are acquired by state authorities.

California	— Cal. Pub. Util. Code §§ 25054 (1965), 28853 (1965), 30753 (1965), 50123 (1965), 90351 (Supp. 1966), 95653 (Supp. 1966). Cal. Pub. Util. Code App. 3, § 13.93 (1965).
Connecticut	— Conn. Gen. Stat. Ann. ch. 103A, § 7-273(i) (Supp. 1966)
Delaware	— Del. Code Ann. tit. 19, § 802 (Supp. 1966)
Illinois	— Ill. Ann. Stat. tit. 111⅔, §§ 329 and 353.5 (Smith-Hurd 1966)
Indiana	— Ind. Stat. "Urban Mass Transportation Act of 1965" § 48-8823 (Burns Supp. 1967)
Iowa	— Iowa Code Ann. § 386B.15 (Supp. 1966)
Louisiana	— La. Rev. Stat. Ann. tit. 23, § 8906 (West. Supp. 1966)
Maine	— Maine Rev. Stat. Ann. tit. 30, § 4979 (Supp. 1967)
Maryland	— Md. Ann. Code art. 64B, § 14(1) (1961)
Ohio	— Ohio Code Ann. ch. 306, § 306.04 (Page Supp. 1966)
Pennsylvania	— Purdon Ann. Stat. Title 66, § 2025 (Supp. 1966)
Rhode Island	— R. I. Gen. Laws ch. 18, § 39-18-17 (Supp. 1966)
Washington	— Wash. Rev. Code Ann. § 35.58.265 (Supp. 1966)

In certain of the statutes referred to, specific provision is made for taking into consideration the pension obligation in fixing the value on condemnation or the price on acquisition, thus directly raising the

PTC's employees rely upon the security of the "fare box", and the Transport Workers Union in its brief to the Pennsylvania Supreme Court expressly said so.* The SEPTA Act attempted to provide this security. Section 8(f)(24)(.1)(iii) of the SEPTA Act (66 P. S. § 2008(f)(24)(.1)(iii) was intended to settle this problem by requiring that where a state authority condemned the entire assets (as here) or a substantial part thereof, of a mass transportation system, and

> "where it is contemplated that a substantial portion of the employees of such utility shall be transferred to and become employees of the authority,"

the authority must assume the liability under any pre-existing pension or retirement system with respect to both past and present employees. This same test was to apply in the case of a negotiated purchase. Nevertheless, SEPTA and the City sought to avoid any obligation to PTC's retired employees.

Where, as here, the regulated rates provide only for current payments of pensions on a pay-as-you-go basis and make no provision for funding of future payments, the element of retroactive denial of a fair rate of return is present. The difference between a regulated company and a normal manufacturing company in this respect is not gen-

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issue of retroactive denial of a fair rate of return. However, even in those cases where the statutes provide only for the assumption of future pension obligations, a question may arise as to the compensation to be paid.

* "[T]he fact is conceded—and this Court below has overlooked—that *the pensioners have heretofore had the security of the fare-box and that they are deprived of this security by the order of the Court below.* So long as the continuing employer, be it PTC or SEPTA, receives the operating revenue and is liable to pay existing and future pensions from those receipts, the pensions are secured and protected" [Brief for Amicus Curiae Transport Workers Union of America and Transport Workers Union of Philadelphia, Local 234, at page 9.]

erally understood. The result is great confusion and unfairness. The current trend for fostering regional transportation systems by use of federal grants makes this issue one of increasing pertinence and importance. Clarification of the law in this respect is, therefore, in the public interest, whether it relates to a condemnation or a negotiated purchase.

C. Condemnation Without Just Compensation Under the Guise of Exercising and Interpreting a Purchase Option, Pursuant to a Concert of Action Among State Instrumentalities, Violates Petitioners' Rights Under the Fourteenth Amendment.

No sensible person would ever have agreed to sell his property under a perpetual option which leaves him with nothing but liabilities as the reward for the successful development and profitable operation of his business. Yet that is what the state courts said the company did when it signed the 1939 agreement. Nothing in the agreement either justified or made this conclusion necessary. The courts reached this result by a series of arguments having no fair or substantial basis in the agreement or in state law.

The facts demonstrating the confiscatory nature of the purchase option as applied and construed here by the state courts have been sufficiently indicated for present purposes in the statement of Questions Presented (pp. 3-7, *supra*), the Statement (pp. 16-17, *supra*), and under points B. (pp. 22-27, *supra*) and D. (pp. 32-38, *infra*) hereof. There are, however, certain aspects of all this which deserve special emphasis here.

Where a state court decision on a question of state substantive law rests upon an inadequate or untenable state ground or does not have "fair support" under state law, this Court will not be swayed by such evasion in order to

avoid a federal ground subject to review in this Court. *Broad River Power Co. v. South Carolina,* 281 U. S. 537, 540-41, 543 (1930). In the present case the state trial court excluded all evidence of a fair valuation of petitioner's assets, asserting that such evidence was legally immaterial in interpreting the term "undistributed corporate surplus" as used in Section Eleventh of the 1939 Agreement (Appendix, p. 145-58a), because only balance sheet values were to be considered and then refused to consider expert accounting testimony as to the meaning of the phrase "undistributed corporate surplus" in its relation to the balance sheet, and in relation to the treatment of the pension liability in the case of a regulated company. By this means the trial court avoided any factual test as to the reasonableness of its interpretation or of the adequacy of the price formula and reached a conclusion that was wholly unreasonable. The question then is whether there was "fair support" for the trial court's ruling that "undistributed corporate surplus" meant only "Retained Earnings" on the Company's balance sheet, that it did not include "capital surplus" or any increase thereof because of appreciation in value and that it did not require SEPTA to assume PTC's liabilities.

At the time the 1939 Agreement was drafted the meaning of the term "surplus" had been interpreted by this Court in *Edwards v. Douglas,* 269 U. S. 204, 214 (1925), as follows:

> "The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an account on corporate books. But this is not true of the words 'undivided profits.' The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a

> price above par. It may be 'earned surplus' as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property."

Accord, Branch v. Kaiser, 291 Pa. 543, 549, 140 Atl. 498 (1928).

The provision in the 1939 amendment with respect to "undistributed corporate surplus" was new as was the requirement that the purchase price include funded debt and that funded debt should be paid. Accordingly, the requirement that the assets be taken "subject to all indebtedness" (upon which the Court placed sole reliance), as had theretofore been true, was no longer apposite and the clause was eliminated. There was no change in the prior provision of paragraph Twelfth of the Agreement that the City was not to be liable for the "debts, obligations or liabilities" of PTC "unless and until" the option was exercised, or in the provision of paragraph Eleventh that the "entire transportation system" was to be purchased "as a whole."

On this state of facts, Judge Spaeth held that:

> 1. The phrase "surplus" was limited to "retained earnings":
>
> 2. Although the consideration was measured by surplus as so interpreted, liabilities are to remain with PTC even though by definition of this Court and the Pennsylvania Supreme Court, surplus meant "net assets of a corporation in excess of all liabilities."
>
> 3. No capital surplus was included, with the result that the capital resulting from reclassification of preferred stock into common stock was excluded. This was given no consideration.

The primary reasoning of Judge Spaeth is that it would have been advantageous to the City in 1939 to exclude any appreciation of assets in an option formula. His conclusion was derived, not from a careful reading of the language of the Agreement itself, which was obviously drafted by attorneys skilled in the intricacies of Pennsylvania corporate and public utilities law, but entirely from the informal statement of advocates urging adoption of the 1939 Agreement before a committee of the City Council (Appendix pp. 150-57a). This, however, does not explain why the City would use the phrase "undistributed corporate surplus" to mean "retained earnings," when it could easily have used "retained earnings." Mr. Justice Roberts termed the conclusion limiting undistributed corporate surplus to retained earnings a "non-sequitur", and said "I can see no justification for giving SEPTA the capital surplus as a windfall." (Appendix p. 39a).

Judge Spaeth's reasoning with respect to why "undistributed capital surplus" should be limited to retained earnings is set forth at pages 158-63a of Appendix D and is based on the belief that ". . . it appears that it was possible that PTC would have earned accumulated but unpaid dividends on preferred shares in an amount that would exceed the amount of "earned surplus" (or "retained earnings") at the end of a given year" (Appendix p. 161a). That is not so because earnings were accumulated on the preferred shares only if earned, and therefore, could not exceed earned surplus.

The absurdity of the construction that liabilities remain with PTC is illustrated by the fact that if it were to purchase properties on short term notes it would, under this interpretation, be responsible for the payment of the liabilities, but the property would be given to the purchaser without adjustment in the price.

The Court also stated that cash could be used to pay liabilities but if, as has been the case, the Company were to use its cash to purchase long-term debt the result might be to decrease the purchase price by the amount of funded debt and to deplete the fund from which the Court said liabilities might be paid. Mr. Justice Roberts, in his dissenting opinion stated that he was "disturbed by the uncertainty created by the Court's treatment of PTC's current cash and liabilities" and said:

> "In my view this confusion, which is not necessary and could produce a most inequitable result" should be clarified. (Appendix p. 39a).

In addition, after the declaratory judgment suit was instituted, the time for closing of the agreement was extended to a definite date in arm's length bargaining. Nevertheless the Court overrode this agreement of the parties and granted a "reasonable time, not less than six months" after the termination of the litigation. What the court did was to make a new agreement for the parties.

The SEPTA Act provided that the concept of fair value should apply in condemnation or in a negotiated purchase (See pp. 238a, 264-65a, *supra*). The entire Act was directed at the acquisition of PTC, as the trial judge understood. It is a fair inference that the legislature would not want to have PTC or its stockholders trampled upon, yet the Court permitted SEPTA, by obtaining an assignment of the contract from PTC, to avoid the provisions of the SEPTA Act requiring just compensation and the assumption of the pension obligations. This brings us to the question of whether a condition can be attached to such an agreement which can produce such unfair, whimsical and confiscatory results.

D. Enforcement by the State of an Unconstitutional Condition Denying Just Compensation for Petitioners' Property Raises Important Constitutional Issues Particularly in the Light of the Protection Given to Other Fundamental Rights.

The confiscatory result reached in this case does not, we believe, fall within the scope of those cases which have permitted a shading of constitutional standards where the condition exacted by a state or federal agency is in reasonable relationship to privileges or franchises granted and to the continued conduct of its regulatory functions.* SEPTA, a state agency seeking to exercise an option which it received only through assignment and for which it gave PTC no franchise or anything else, should not be permitted to enforce such a harsh and unreasonable condition.

The unreasonable nature of the condition involved here is best illustrated by the fact that the state courts have construed this to be a *perpetual* option and there is no pretense that the purchase price thereunder would ever have any relationship to fair value.** Instead, the result is clearly confiscatory. The option contract as interpreted was no less than a compelled "waiver" of PTC's constitutional right to due process and just compensation.

There is growing recognition that governmental powers may not be exercised to impose conditions which require

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* See *Fox River Paper Company v. Railroad Commission of Wisconsin*, 274 U. S. 651 (1927); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940).

** In *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145, 151 (1929), this Court stated that "It is possible for a state to authorize a municipal corporation [here the City] by agreement to establish public service rates and thereby *to suspend for a term of years not grossly excessive* the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities." [Emphasis added.]

the relinquishment of constitutional rights, that is, unconstitutional conditions. See *Frost v. Railroad Commission,* 271 U. S. 583 (1926); *United States v. Chicago, M., St. P. & P. R. R.,* 282 U. S. 311 (1931); *Fowler v. Rhode Island,* 345 U. S. 67 (1953); *Speiser v. Randall,* 357 U. S. 513, 518-19 (1958); *Sherbert v. Verner,* 374 U. S. 398, 404-6 (1963); and *Thorpe v. Housing Authority,* 386 U. S. 670, 678 (1967) (Douglas, J., concurring). See also *Hague v. C. I. O.,* 307 U. S. 496, 514-16 (1939) and *Jamison v. Texas,* 318 U. S. 413, 415-16 (1943). See generally, Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960).

In *Hague, Jamison, Fowler,* and *Speiser,* this Court did not hesitate to strike down unconstitutional conditions violating personal freedoms and liberties protected by the First and Fourteenth Amendments.

The fact that the state or federal government may have a contract right is not a sufficient justification. Thus in *Thorpe v. Housing Authority,* 386 U. S. 670, 678 (1967), the Authority availed itself of a lease provision to terminate a tenant's lease. Although no reason was given for the termination, the notice was given the day after the tenant had participated in a tenants' protective meeting. Since the Authority later changed its rules to require advice to the tenant of the reason for termination in such circumstances, the per curiam order of this Court did not reach the constitutional issue. Mr. Justice Douglas, in his concurring opinion, stated:

> "It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. 'The government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law. . . .'"

He further said:

> "In *United States v. Chicago, M., St. P. & P. R. R.*, 282 U. S. 311, the Court said that 'the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provision of the federal constitution.' This was in the tradition of *Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 594, where the Court emphasized that 'If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guarantees embodied in the Constitution of the United States may thus be manipulated out of existence.' "

The Court in *Frost* in enunciating the basic principle relating to unconstitutional conditions made the following specific reference to the general rule relating to the grant of a privilege upon conditions:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. 271 U. S. at 593-4.

Personal freedoms are bound together in innumerable ways. See *Shelley v. Kraemer*, 334 U. S. 1, 10 (1948). It is no accident that the same clause of the Fourteenth Amendment provides in close sequence that a state shall not "deprive any person of life, liberty, or property; nor deny to any person within its jurisdiction the equal pro-

tection of the laws." The right to just compensation is a substantial right deserving full constitutional protection. If a state can retain a string on a man's property which enables it to confiscate it at will, the state can destroy him and his ambitions to raise his standards, to educate his children and to improve his condition in life. Personal and property rights are basic freedoms in America, unlike the situation in some other countries.

PTC has 14,000 stockholders residing throughout the United States. A large number of them each have modest holdings of PTC's stock. They include many present and former employees of the Company and members of their families who look upon their holdings as important assets. The net amount of any purchase price received by PTC from SEPTA will have a direct and immediate impact upon the stockholders and their personal lives.

The right of purchase retained by the City in a changed form in 1939 was a by-product of the need for obtaining the City's consent to modification of the prior contract of 1907. SEPTA's contention that the presence of a contract eliminates any constitutional question does not meet the issue as to the unconstitutional condition included in the contract. Neither *Fox River Paper Company v. Railroad Commission,* 274 U. S. 651 (1927), nor *United States v. Appalachian Electric Power Co.,* 311 U. S. 377 (1940) justifies this position. Neither of those cases involved the question of the valuation to be placed upon the physical assets of the company concerned. The sole question was the value to be placed on water power rights in which the courts held the company had no property right.*

There is no relation between the option as interpreted and values attributable to the grant by the City of any

* The same was true in *United States v. Rands,* — U.S. — (1967), 36 U.S. Law Week 4012, with respect to port rights.

franchise or privilege of a governmental nature. PTC has made no claim in these proceedings for values based upon franchises or other such intangibles. Instead, it seeks only to obtain a fair purchase price for the actual value of the properties which it owns and which do not flow from any grant of a privilege or franchise by the City.*

This petition for certiorari raises the very important constitutional question as to whether and, if so, to what extent and under what limited circumstances, a state shall be permitted, under the constitutional view of the Fourteenth Amendment today, to impose and enforce an unconstitutional condition which will deprive a person of *property* without due process of law.

E. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States Prohibits State Agencies From Dealing Unfairly With a Private Corporation to Secure an Agreement Under Which Its Property May Be Taken Without Just Compensation.

Petitioners Janney, et al., intervening stockholders, have contended since the outset of this litigation that neither PTC nor the City intended that the 1965 extension Agreement would serve as a basis for the transfer of the City's purchase-option rights to SEPTA.** Furthermore, the

* Since prior to 1939 the City has not had the power to grant franchises for public transportation in the streets of Philadelphia and the bulk of PTC's operating rights have stemmed from the Pennsylvania Public Utility Commission (not the City) and from independent leases and agreements with the City under which PTC makes separately specified payments.

** The City knew that PTC thought it was doing the City a favor by extending, for a short time, the Broad Street Subway lease agreement, and that part of the 1962 extension agreement by which PTC was obligated to pay the City the sum of $560,000 per year for the privilege of using the City's streets. Since PTC considered both the subway rental of $900,000 per year and the license fee of $560,000 per year to be grossly excessive, PTC had absolutely nothing to gain

City had given PTC every reason to believe that the City was disinterested in its purchase-option rights.*

Under the circumstances, the principles of fair play embodied in the due process clause of the Fourteenth Amendment to the Constitution of the United States required the City to give PTC notice when it came to the decision to grant SEPTA's request to assign the purchase option to SEPTA and that it would use the 1965 agreement to support the validity of SEPTA's right to purchase PTC's property under the option. If PTC had received such notice it could have, and undoubtedly would have, withdrawn its consent to the Agreement. The City gave no such notice. Instead, it kept possession of its draft of the Agreement, already signed by PTC, and waited until Mayor Tate's return on February 25, 1965. The Agreement was executed by the City and immediately put before City Council as the basis for enactment of an ordinance authorizing the executive officers of the City to assign the option to SEPTA.

After the instant action was commenced, the City changed its position by arguing the assignment to SEPTA could be upheld on the theory that the City's purchase option under the 1907 Agreement was intended to be perpetual. This argument was a mere afterthought. This

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by agreeing to the six-month extension. The City wanted and requested a two-and-one-half-year extension. Under these circumstances it can only be supposed that PTC intended the 1965 Agreement to serve as a temporary, or stop-gap, accommodation, and certainly not as an extension of the City's expiring purchase-option rights to acquire PTC's property by paying only a very small fraction of the actual value of that property.

* The mayor assumed that PTC and SEPTA would reach an agreement of purchase, and he assured PTC, in effect, that the City would not become involved in the PTC-SEPTA negotiations. (See, for example, the exchange of letters between the City's Mayor, Mr. Tate, and PTC's Director, Mr. McShain, Appendix pp. 308-10a).

is demonstrated by a number of circumstances,* the most important of which is that the Supreme Court of Pennsylvania previously held to the contrary in a 1960 declaratory judgment action between the City and PTC. In that case the Supreme Court of Pennsylvania said:

> "On July 1, 1907, the City and the Philadelphia Rapid Transit Company, of which PTC is now the successor, entered into a written agreement which, by a later *extension,* remains effective until July 1, 1962. The City is granted an option to purchase on the first of July of any year, *while the agreement is in force,* all the leaseholds, franchises, real and personal property of PTC and its wholly owned subsidiaries." *Philadelphia v. Philadelphia Transportation Company,* 304 Pa. 282, 283-4 (1961).

Having once decided that the agreement must be kept effective by amendatory agreements, the state courts cannot avoid the federal questions raised in this case by now holding, to the contrary, that the agreement is perpetual.

All of these facts show that the decrees of the state courts were necessarily based in large part on the 1965 agreement and that this agreement was procured unfairly by the City to support SEPTA's purchase of PTC's property under the option for a fraction of its value. This Court should consider whether state agencies can profit from such unfairness.

---

* (1) The City's ordinance authorizing assignment of its rights to SEPTA, the assignment itself, and the complaint jointly filed in the case, by the City and SEPTA, for the purpose of enforcing the assignment, were all expressly based on the 1907 agreement as amended by the 1965 agreement.

(2) The chronology shows that the City and SEPTA hurried to complete the assignment and to commence the suit before the expiration of the 1965 Agreement on June 30, 1965.

CONCLUSION.

The final result of the state court's decision is to give PTC nothing. This is because the imposition of the burden for future pensions presents PTC with an insoluble problem. The cost of funding future pension payments is merely an estimate as is the adequacy of the Company's reserve for injuries and damages. These estimates change from time to time as life expectancies and jury verdicts increase. What it comes down to is that PTC can never safely make any distribution to its stockholders. The result is not that PTC's stockholders will receive a maximum of $4.5 million but that, in fact, they will receive nothing at all.

As the trial court's historical recital shows, it is opposed to privately owned mass transportation and, as its decision shows, it is in favor of public ownership of PTC's property. However laudable the motivation may be to develop a publicly-owned transportation system, there is no way to circumvent the constitutional requirement of paying for the change. The state courts here have attempted such a short cut by giving PTC's property to SEPTA without any compensation to PTC's stockholders.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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APPENDIX A.

Opinions of the Supreme Court of Pennsylvania Affirming the Declaratory Judgment.

COHEN, *J.* FILED: July 27, 1967

These appeals involve two separate actions concerning the same matters. The first (appeals number 188 and 194) presents a petition seeking a declaratory judgment, which action was brought June 18, 1965 by Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia against Philadelphia Transportation Company (PTC) and its subsidiaries. Plaintiffs' petition requested the court to determine (1) the right of SEPTA as the city's assignee to purchase the assets of PTC pursuant to an option to purchase contained in paragraph Eleventh of an agreement dated July 1, 1907, as amended; (2) the meaning of the purchase price formula set forth in the agreement; and (3) such other matters necessary to effect the transfer of PTC's property. Thereafter, certain minority shareholders of PTC petitioned to intervene as defendants, and their petition was granted by this Court on May 13, 1966. After hearing extensive testimony, the trial court held on July 14, 1966 (approved by the court en banc on Sept. 16, 1966) that (1) the city's reserved right of purchase under the agreement of 1907, as amended, was valid; (2) the city's assignment of that right to SEPTA was valid; (3) SEPTA, as the city's assignee, must pay to PTC a sum composed of the following amounts reflected by PTC's balance sheet as of the date of payment: (a) an amount equal to PTC's then outstanding bond, mortgage and ground rent indebtedness; (b) an amount equal to ten dollars per share for all then outstanding common stock of PTC; and (c) the amount of the then "Retained Earnings" of PTC.

The second action (appeals number 189 and 192) involves a complaint in equity filed July 8, 1966 by Edmond G. Thomas (a taxpayer) and PTC against the City, the Mayor, and the Commissioner of Public Property of Philadelphia, and against SEPTA. Plaintiffs' complaint prayed, inter alia, for an injunction restraining defendants from carrying out the agreement of June 8, 1965, whereby the city assigned to SEPTA its right to purchase PTC. The city and SEPTA filed preliminary objections, and on September 16, 1966 the complaint was dismissed for the reasons stated in the opinion of the court en banc filed that day in the declaratory judgment proceeding.

The lower court's opinion, we believe, sets forth a comprehensive well-reasoned analysis of the problems involved and proposes, in every instance, a solution which this Court deems fair and proper. Accordingly, we recommend to the interested reader that he closely study that opinion, for we intend here only to highlight the matters of importance.

In 1902, the Philadelphia Rapid Transit Company (PRT) was formed as a consolidation of the various transit systems previously existing in Philadelphia. On its own or through subsidiaries, PRT leased, owned and operated high speed lines, and bus and taxi facilities throughout the city. On July 1, 1907, the city and PRT entered into a written agreement which provided in Section Eleventh:

> "The City reserves the right to purchase all the property, leaseholds and franchises of the Company, subject to all indebtedness . . . upon July 1st, 1957, or upon the first day of any July thereafter by serving six months' notice . . . [for] an amount equal to par for its capital stock then outstanding, to wit: the thirty million (30,000,000) dollars of capital stock now authorized plus any additional capital stock issued with the consent of the City hereunder. . . ."

In the decades that followed, PRT suffered financial misfortune. Finally, in 1938 the Pennsylvania Public Utility Commission approved a reorganization plan filed by PRT. On May 20, 1939, City Council consented to the reorganization and enacted an ordinance authorizing the execution of an amendment to the 1907 agreement. On June 12, 1939, the amendment was executed. It made five major changes in Section Eleventh:

1. The 1939 agreement enabled the city to purchase the *entire* transportation system (since PTC, unlike PRT, owned the leaseholds and franchises of the underliers and traction companies), not just PRT's leaseholds and franchises, as provided in the 1907 agreement.

2. It allowed the city to purchase PTC's assets free and clear and not subject to PTC's indebtedness.

3. It permitted the city to exercise its reserved right of purchase on any July 1, with 6 months' notice to PTC.

4. The formula for determining the purchase price was changed to the following:

   a. The amount of PTC's outstanding bonds, mortgage and ground rents;

   b. The par value of PTC's outstanding preferred stock;

   c. $10.00 per share of PTC's outstanding common stock;

   d. The amount of PTC's then undistributed corporate surplus.

5. The city reserved the right of condemnation.

The 1907 agreement was further amended on October 26, 1950, July 1, 1957, July 5, 1962 and February 25, 1965.

PTC argues that the purchase option was void under the rule against perpetuities. As the lower court said:

> "The best way to state PTC's argument is to state its best case.
>
> "In *Barton v. Thaw, Appellant,* 246 Pa. 348 (1914), plaintiffs were children of Joseph Barton, who had conveyed coal under certain land to Thaw's predecessors in title, by a deed that provided that
>
> > 'And in case the said parties of the second part, their heirs or assigns, should at any future time whatsoever desire to purchase any of said land in fee simple, then the said parties of the first part, for themselves, their heirs or assigns, hereby covenant and agree to sell and convey the same to the said parties of the second part, their heirs or assigns, hereby covenant and agree to sell and convey the same to the said parties of the second part, their heirs or assigns, at a price not exceeding one hundred dollars per acre.' (246 Pa. at 350)
>
> "The sale of the coal was admittedly good, but plaintiffs claim, by a bill to remove a cloud upon title, that the option to purchase the surface of the land was void because in violation of the rule against perpetuities. 'It [was] conceded by counsel that the case presents for the first time to the courts of Pennsylvania the question whether an option or right to purchase land, unlimited in point of time, violates the rule against perpetuities, and therefore is void. . . .' (246 Pa. 350-351). The lower court in a careful opin-

ion held that the option did violate the rule, and the Supreme Court affirmed.

"PTC's argument is that the City's reserved right of purchase is also an option 'unlimited in point of time,' and therefore it is also void. It has been seen, above, that indeed the City's right of purchase is thus unlimited. Is it, however, therefore void?"

The historical purpose of the rule against perpetuities was to destroy serious hindrances to the beneficial and prosperous use of property. PTC claims that under *Barton v. Thaw,* supra, Pennsylvania law recognizes a blanket condemnation of all remote options. That is not so, for *Barton* stated at 246 Pa. 364 that its result is dependent on the interests of the community at large. In this case, the danger of fettering the free use of property is outweighed by considerations of public concern and welfare.

Furthermore, the purchase option is not an impress on land but is solely a contract right not within the rule against perpetuities. In *Philadelphia v. Philadelphia Transportation Co.,* 386 Pa. 205, 125 A.2d 594 (1956), this Court stated that until exercised the option gave the city no right in PTC's property as such, but merely a contractual right. With regard to exclusively contractual rights, the Restatement of Property, § 401 provides, "A transaction which is exclusively contractual is not subject to the rule against perpetuities." This Court took the same view in *Caplan v. Pittsburgh,* 375 Pa. 268, 100 A.2d 380 (1953).

Moreover, even assuming that the purchase option fell within and did violate the common law rule against perpetuities the Estates Act of 1947, Act of April 24, 1947, P.L. 100, 20 P.S. § 301.4 makes that rule inapplicable. Sub-sections 4(a) and (b) provide, "No interest shall be

void as a perpetuity except . . . [u]pon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events. . . ."

With regard to this matter, the lower court stated:

"Thus, if an option void at common law actually vests within 21 years, it is valid even though it might not have vested that soon. Or, as Bregy puts the point, at page 5307 of his treatise on the Estates Act:

> '. . . such agreements will no longer be void from the beginning as in *Barton v. Thaw*. Under the statute an unlimited option should be allowed to run until the expiration of the permissible period, and stricken down only if it remains unexercised at that time.' (footnotes omitted).

"If the City and PRT had made no further agreements after the Agreement of 1939, the Estates Act of 1947 would not be pertinent. However, as was seen in discussing the duration of the City's reserved right of purchase, the City and PRT made the Agreements of 1957, 1962, and 1965. The importance of this fact appears when one considers Section 21 of the Estates Act, 20 P.S. § 301.21. This provides that the Estates Act

> '. . . shall take effect on the first day of January, one thousand nine hundred forty-eight, and [except in respects not here material] shall apply only to conveyances effective on or after that day. As to conveyances effective before that day, the existing laws shall remain in full force and effect.' "

Section 1 of the Estates Act defines a conveyance as ". . . an act by which it is intended to create an interest

in real or personal property whether the act is intended to have inter vivos or testamentary operation." If the 1957 agreement is a conveyance under that definition, the Estates Act of 1947 applies, and the "wait and see" rule was complied with, for the option was in fact exercised within the time limitation of the rule against perpetuities dating from July 1, 1957.

Based on the premise that the city's reserved right of purchase expired July 1, 1957, and was extended by agreement to December 31, 1964, PTC further argues that SEPTA's attempt to exercise the purchase option was ineffective because it was not timely and that the option period was not further extended by the 1965 agreement because the latter agreement was never approved by PTC's shareholders. We agree with the lower court's conclusion that the premise of those arguments is unsound because under the 1939 agreement the reserved right of purchase remained effective until exercised.

The intervening minority shareholders argue that the agreement of 1965 was not intended to extend the reserved right of purchase, but by "fraud, accident or mistake" the 1965 agreement failed to express this limitation. Again, we agree that the court's evaluation of intervenors' evidence in this respect to the effect that they were unsuccessful in proving fraud, accident or mistake. Rather, the testimony of their witnesses tended to prove that the city intended to *preserve* the option to purchase PTC, and not to allow it to expire so that there was no mutual mistake; nor were the representatives of PTC misled by the city during negotions of the 1965 agreement.

PTC asserts that the assignment to SEPTA was invalid because it was made without public auction. The lower court carefully analysed this question in the following manner.

Section Eleventh of the 1907 agreement, which was carried over into the 1939 agreement, provides that the city may assign its reserved right of purchase and that the company may become a bidder for that right. On June 8, 1965, the city made the assignment to SEPTA, which exercised the right on the same day. No notice of the assignment was given to PTC, nor was a public auction or competitive bidding permitted.

PTC does not argue that the agreement of 1907 *requires* public auction because it says "*may* be put up at public auction." (Emphasis supplied.) Instead, PTC argues that the Home Rule Charter of 1951 requires a public auction. The Home Rule Charter is, however, irrelevant.

Section 11 of the First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, 53 P.S. § 13111 provides that no contract existing at the time of adoption of any home rule charter shall be affected thereby. Since the agreement of 1939 does not *require* public auction, the Philadelphia Home Rule Charter cannot affect that agreement no matter what it says about public auctions.

Moreover, public policy does not require assignment by public auction. The reason for requiring competitive bidding is to prevent private business from gaining favors of government or from corrupting government. Here, the assignee is another government agency and the reasons in favor of bidding competitively are absent.

The most perplexing problem concerns interpretation of the purchase price formula. Four factors are involved:

> "1) an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries. . . .;

"2) plus the par value of all then outstanding preferred stock of Company. . . . ;

"3) and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company. . . . ;

"4) and the amount of the then undistributed corporate surplus, if any, of Company."

The word "then" refers with respect to each factor to the particular July 1st named in the notice of intent to exercise the option. SEPTA named July 1, 1966 as the settlement date, and the parties extended this date to January 1, 1967.

The first three factors present no problem of interpretation or computation. The amount of the outstanding bonds, mortgages and ground rents can readily be ascertained; there is no outstanding preferred stock because PTC converted its preferred stock to common stock in 1955; and the amount of outstanding common stock can be determined without difficulty. Only the meaning of "undistributed corporate surplus" is at issue.

PTC and the minority shareholders propose that "undistributed corporate surplus" is the excess of the appraised value of PTC's assets over the value of its liabilities and capital as of the settlement date. The trial court rejected this argument and held that the fourth factor of the formula was reflected on PTC's balance sheet figure as "Retained Earnings." As the court observed:

> "One of the great attractions of a purchase price formula is that the buyer can figure out what the price will be before he exercises his option and commits himself to purchase. A valuation proceeding after the option is exercised defeats this purpose.

"This is so on general principles. Thus the Supreme Court, in *Philadelphia v. Phila. T. Co., Aplnt.*, 386 Pa. 231, 239 (1956), said of the purchase price formula:

> '. . . the price to be paid for the property according to the option is determinable by a fixed formula whereas a condemnation proceeding must depend upon the uncertain decision of a fact-finding tribunal as to the value of the property then being acquired.' (footnote omitted.)

"In addition, the history of the underliers and PRT, the other provisions of the agreement, and the legislative history of the formula itself, all demonstrate that 'undistributed corporate surplus' is not a valuation but a balance sheet figure.

"Moreover, the other provisions of the Agreement of 1939 gave the City control over the other factors of the formula. Section First of the Agreement of 1907, which was not amended but continued in effect by the Agreement of 1939, provided that 'No further increase of capital stock or funded indebtedness . . . shall be made by the Company . . . without the consent of the City. . . .' Also, if more bonds were issued by the Company, there would be a corresponding increase of assets, which the City would acquire if it exercised its right to purchase. Still further, the City was entitled to representation on the board of directors (Section Fourth of the Agreement of 1907 and Section 1(a) of the Agreement of 1939), and the City Controller was empowered to examine the Company's books (Section Fifth of the Agreement of 1907, continued in effect by the Agreement of 1939).

"Thus PTC's argument comes down to an assertion that of the four factors of the formula, all could

be controlled by the City, and could be determined by an examination of the balance sheet, before the City decided whether to exercise its right of purchase, except for one factor—'undistributed corporate surplus.' This assertion is almost self-defeating. In any case, the hearings before the Transportation and Public Utilities Committee of City Council in April and May of 1939 demonstrate that both PRT (seeking the City's consent to be reorganized as PTC) and the City understood the formula to be a simple mathematical calculation based on book figures.

"In essence, what the hearings demonstrate is that PTC's present argument as to the meaning of 'undistributed surplus' is based upon a practice precisely contrary to the purpose of the Agreement of 1939. In PTC's present view the 1939 amendment called for PTC to reap the benefits of any increase in the unrealized value of its assets in the event of a sale to the City under the City's option. The hearings make it clear that the formula was to do just the opposite: the City was to reap any increase in the unrealized value of PTC's assets, if, but only if, the City exercised its option and thereby purchased the PTC system as a whole."

By providing for a purchase price formula and by electing to exercise the option to purchase, rather than to proceed by condemnation, SEPTA was assured of being able to determine for itself the price to be paid by an examination of PTC's balance sheet figures, rather than by a lengthy valuation process which would leave the purchase price determination to a fact-finding body. Clearly, "undistributed corporate surplus" is not a valuation, but a balance sheet figure, as are the other three factors.

"Undistributed corporate surplus" is a factor which represents earnings accumulated by PTC rather than earnings paid out as dividends. That language assured the shareholders that when the option was exercised, they would receive so much of the accumulated earnings as were not paid to them as dividends. Had the only class of shareholders of PTC in 1939 been common shareholders, the phrase "retained earnings" or "earned surplus" would have accomplished that purpose. However, PTC had preferred shareholders whose dividend rights upon liquidation were, pursuant to the articles of incorporation, cumulative if, in fact, dividends were earned. Thus, it was possible for PTC to have at the end of a given year earned, accumulated, but *unpaid* dividends on preferred shares of stock in an amount that would exceed the amount of "earned surplus" (or "retained earnings"). On account of this situation, the draftsmen of the 1939 agreement did not use as a price factor a sum equal to PTC's "then retained earnings," because in such a situation had the option been exercised the common shareholders would have received less than ten dollars per share. The draftsmen clearly desired to insure that the common stockholders received ten dollars a share if the city exercised its option and not a lesser sum because of an obligation by PTC in liquidating to pay preferred shareholders earned, accumulated, but unpaid dividends. Accordingly, so long as there were preferred stockholders, "undistributed corporate surplus" meant the greater of PTC's retained earnings or its earned, accumulated, but unpaid dividends as of the settlement date. Since 1955, when PTC converted its preferred stock to common stock, there have been no earned, accumulated, but unpaid dividends. Accordingly, by paying an amount equal to PTC's retained earnings, the city will achieve the purpose of the formula—that the common shareholders get back

what they risked: so much of the accumulated earnings as were not paid to them in dividends. And this is what "undistributed corporate surplus" means.

This means PTC's retained earnings, because, in the language of the court below:

> "PTC's present balance sheet carries two accounts: 'Capital Surplus' and 'Retained Earnings' As has just been seen, 'undistributed corporate surplus' means a fund available for the payment of cash dividends. Therefore, it includes only PTC's 'Retained Earnings' account. It does not include the 'Capital Surplus' account because under Pennsylvania law cash dividends cannot be paid from capital surplus. *Branch, Trustee, v. Kaiser, et al., Appellant,* 291 Pa. 543 (1938); *Berks Broadcasting Co. v. Gaumer et al.,* 356 Pa. 620 (1947)." (Footnote omitted.)

PTC's retired employees receive pension benefits on a pay-as-you-go basis. PTC has no funded pension plan; pension benefits are paid out of the fare box from current revenues. Actuarial studies reveal that the amounts required to fund past service costs would be approximately $11,939,392 for non-supervisory retirees and $4,973,304 for supervisory and executive retirees. The parties have stipulated that this $17,000,000 obligation is a present vested liability. The question presented is whether PTC's "undistributed corporate surplus" is extinguished by its obligation to its retired employees. SEPTA's accounting expert testified that minimum standards of accounting principles require that a vested pension liability be carried on the liability side of the balance sheet. PTC did not, in fact, do so because the pension obligation was never funded. Rather, the actuarily determined amount of the obligation was revealed in a footnote to their annual financial reports.

SEPTA argues that if this liability were placed on the books, it would eliminate all surplus, because there is no offsetting asset on the books. Consequently, there would be no retained earnings or "undistributed corporate surplus." Accordingly, contends SEPTA, the purchase price need not include any amount representing PTC's "undistributed corporate surplus."

PTC, on the other hand, presented expert testimony justifying its accounting techniques with respect to its pension liability because as a public utility its rates were fixed by taking into account pay-as-you-go pension payments in the rates for the year of payment. Thus, argues PTC, it does not have a fund available for cash dividends (retained earnings), which is part of the purchase price formula.

As the lower court indicated, the accounting testimony is neither necessary nor appropriate to a resolution of this issue. Rather an examination of the agreements is sufficient to dispose of the matter. As the trial court stated:

> "Section Eleventh of the Agreement of 1907 provided that for a price equal to the par value of PRT's stock the City or its assignee could acquire 'all the property, leaseholds and franchises of the Company, subject to all indebtedness now existing or hereafter lawfully created hereunder upon July 1st, 1957. . . .' This was changed by the Agreement of 1939, so that the City or its assignee, upon payment of the formula price provided in that Agreement, would acquire 'all the property, leaseholds, and franchises of the Company and its wholly owned subsidiaries upon any first day of July thereafter. . . .' The clause 'subject to all indebtedness . . . [etc.]' was eliminated. It follows, therefore, that if SEPTA pays the formula price, it acquires PTC's assets not subject to PTC's obligations,

> i.e., that SEPTA after the acquisition will not be subject to PTC's pension obligation, which is only another way of saying that SEPTA may not refuse to pay the full formula price by charging against it PTC's pension obligation as though SEPTA would be subject to it." (Footnotes omitted.)

On this point, PTC carries the argument further and contends that SEPTA must not only pay for PTC's retained earnings but also must assume PTC's pension obligation. We have already decided that SEPTA must, under the formula, pay for PTC's retained earnings. It is, however, not required under the agreement of 1939 to assume PTC's pension obligations.

The lower court further concluded that SEPTA may not reduce the purchase price by PTC's cost of financing and organization expenses because the 1939 agreement intended the option price to be a single price for all of PTC's leases, franchises and assets, and SEPTA must pay the full purchase price. We agree.

In addition, the trial court decided that in making payment for "accrued interest of . . . then outstanding . . . mortgages," SEPTA must pay PTC a sufficient amount to compensate PTC for any prepayment penalties PTC is called upon to pay if PTC retires its mortgage debt before the maturity date. Again, we agree.

Finally, the court below held that the date when SEPTA must make payment to PTC be extended for a period of not less than six months after final disposition of this case. This is certainly a reasonable extension in view of the fact that SEPTA will not know with certainty the amount it must pay until this case is finally concluded. It must then be allowed sufficient time to raise the money necessary to effect the purchase.

In appeals number 188 and 194, the judgment is affirmed. In appeals number 189 and 192, the order is affirmed.

Mr. Justice Roberts files a dissenting opinion in which Mr. Justice O'Brien Joins.

Mr. Chief Justice Bell files a dissenting opinion.

Mr. Justice Musmanno files a concurring opinion.

CONCURRING OPINION.

MUSMANNO, *J.* FILED: July 27, 1967

No commercial enterprise can achieve success without manpower. The financial resources of the Philadelphia Transportation Company could never have been amassed without the work of its maintenance and transportation employees. Now that PTC is to be sold, the pension rights of the men who manned the tramway cars and buses, and kept them in running condition, must not be lost or mislaid in a labyrinth of complicated fiscal proceedings.

The lower Court properly declared that:

> "PTC is required to provide for the payment of retired employees' pensions before it may distribute the money that will be received from SEPTA when SEPTA purchases PTC's assets."

The Transport Workers Union of America and Transport Workers Union of Philadelphia, Local No. 234 (known as TWU) correctly point out in their brief that their primary concern is that, out of the purchase price paid by SEPTA to PTC, PTC is required to hold back, and not distribute to the PTC shareholders, a sum equal to the liability due and owing the retired employees. This proposition is eminently just and legally unassailable. What the TWU employees have put into their daily toil is as much a part of the PTC assets as bricks are an integral part of the building of which it consists. Every street car and bus is held together by the perspiration of those who toiled to maintain and operate it.

Thus, the moneys due the retired pensioner is a vested liability which PTC may not shed or cast off. This liability cannot be shifted to another track or derailed and certainly not abandoned. I repeat the lower Court's finding, namely,

> "PTC is required to provide for the payment of retired employees' pensions before it may distribute the money that will be received from SEPTA when SEPTA purchases PTC's assets."

Under this language, which is as plain and clear as a street car passing over a trestle bridge, the money due the retired employees must be deducted from the purchase price and held for the employees' pension fund. Any action which would distribute that fund to anyone other than the PTC pensioners, to whom it belongs, would constitute a contempt of the wording and spirit of decision of the court below. This pension money is in effect a trust fund for the protection of the pensioners and must be respected as such. The pension fund is a bread box for the retired employees. It must be kept safe and secure so that the bread it contains will continue to be fresh and life-sustaining.

In addition, it is clear from the record below that, to the extent that that such fund, deducted from the purchase price, should be insufficient to carry out the pension obligation, SEPTA has a liability in the future to pay that pension obligation, if, for any reason whatsoever, PTC might deplete the amount of the purchase price without fully providing for the pension liability to retired employees.

There is a reservoir of moneys in the amounts payable to PTC under the SEPTA purchase. The pensions must be drawn from that reservoir. The time to end the long-drawn out litigation in this case is now. The employees should not be required to seek with a broken tin cup for water in the desert of any further legal controversy.

I affirm, with the majority of the Court, the Order of the Court below.

DISSENTING OPINION.

BELL, *C. J.* FILED: July 27, 1967

I dissent for each of the following reasons:

The Option Is Illegal and Void.

1. SEPTA's claim is based upon the Option which was contained in the 1907 contract between the City of Philadelphia and Philadelphia Rapid Transit Company (now Philadelphia Transportation Company) and which was assigned by the City to SEPTA for no consideration. This Option violated the Rule against Perpetuities and is void!

In *1907*, the City of Philadelphia entered into an Agreement with the Philadelphia Rapid Transit Company. Paragraph Eleventh of this Agreement provided:

"The City reserve[s] the right to purchase all the property, leaseholds and franchises of the Company, subject to all indebtedness . . . *upon July 1st, 1957, or upon the first day of any July thereafter* * by serving six months' notice . . . [for] an amount equal to par for its capital stock then outstanding, to wit: the thirty million ($30,000,000) dollars of capital stock now authorized plus any additional capital stock issued with the consent of the City hereunder. . . ."

Complementing this right to purchase, Paragraph First of the Agreement included the provision "*nor shall the Company, during said term, part with any of its stocks, leaseholds or franchises without like* [*City's*] *consent.*"

In *1939*, the 1907 Agreement was replaced by a new Agreement between the City and the Philadelphia Transportation Company. Paragraph Eleventh of the 1907

* Italics throughout, ours.

Agreement was amended. Although many changes were made by the parties, the most pertinent changes were as follows: The City was given the right to purchase the entire transportation system; it changed the time when the City could exercise its right of purchase from "July 1st, 1957, or upon the first day of any July thereafter" to "*any first day of July hereafter.*" Also, the price that the City was to pay by exercising the right to purchase was changed to a price made up of four factors: (1) the amount of PTC's outstanding bonds, mortgages and ground rents; (2) the par value of PTC's outstanding preferred stock (of which presently there is none); (3) $10 for each share of PTC's outstanding common stock; and (4) "*the amount of . . . [PTC's] then undistributed corporate purplus, if any.*" Furthermore, the City reserved "whatever right to condemn it now has or shall hereafter have," a reservation which was not in the Agreement of 1907.

This 1907 Agreement, as amended by the 1939 Agreement, was amended or extended by Agreements entered into between the City and the PTC in 1950, 1957, 1962 and 1965, the latter two Agreements specifically stating that the extensions were without prejudice to the claim of the PTC that the 1907 Agreement terminated either on December 31, 1964 or on June 30, 1965. The City was thus given the right or option to purchase all of the properties of the PTC *without any time limit specifically imposed on this right,* and until such purchase option was exercised, the PTC could not sell or alienate any of its property, stocks, leaseholds or franchises without the City's consent. Since the City's interest in the PTC properties would not vest until it exercised its purchase option, which clearly and undoubtedly could be exercised later than the period of 21 years allowed by the Rule against Perpetuities, *the Option violates the Rule.*

In upholding the City's right to purchase under the Rule against Perpetuities, the majority relies on three grounds. First, the right to purchase is a contractual right to which the Rule does not apply. Second, if the Rule does apply, the extension Agreement of 1957 acted as a "conveyance" to bring it within the Estates Act of 1947 and the so-called "wait and see" rule incorporated therein. Third, the Rule should not operate on the City's right to purchase for reasons of public policy. I find no merit in any of these contentions.

An option is an offer to sell to the optionee or, conversely, a right given to the optionee to buy certain property at or within a stated period of time and for a specified price, and when supported by consideration is a contract. However, the fact that an option gives what amounts in this case to a contractual right does not insulate it from the Rule against Perpetuities.

The leading case on this point is *Barton v. Thaw,* 246 Pa. 348, 92 Atl. 312 (1914). It involved an option and is squarely in point and controlling. That case arose sur a bill in equity to remove a cloud upon title. In 1881, the owners of land conveyed the coal and other minerals underlying the land to grantees. This conveyance *contained an option* to the grantees, their heirs or assigns "*at any future time whatsoever* . . . to purchase any of said land in fee simple . . . at a price not exceeding $100 per acre." Obviously, there was no time limit within which the option had to be exercised.

This Court adopted the lower Court's learned Opinion in which it traced and reviewed the Rule against Perpuetuities from its ancient beginings and held that it was taken from the common law of England and was part of and imbedded in the common law of our Commonwealth.

The Court accurately stated that the Rule against Perpetuities is a restriction against fettering the alienation of property, that under the Rule vesting must take effect within lives in being and 21 years thereafter (including the period of gestation), that the Rule operates as a nullification and destruction of the intention of the parties, and is a peremptory command of law based upon public policy, and that because of the public policy favoring alienability, the Rule must be remorselessly applied. The Court further said (pages 355, 358, 364, 366):

" '*When lives cannot be taken as a measure, the perpetuity period is twenty-one years.*' Goodwin on Real Property, 280. 'The period of twenty-one years may be taken in gross, that is, limited simply as a space of time, without reference to any minority, and without being preceded by a life or lives in being.' Foulke on Rule against Perpetuities, sec. 340. 'If an absolute term is taken, and no anterior term for a life in being is referred to, *such absolute term cannot be longer than twenty-one years.*' Perry on Trusts, 349. 'As to the time within which an executory estate or interest must arise, it is evident that some time limit must be fixed, for if an unlimited time were allowed for the creation of these future and indestructible estates the alienation of lands might be henceforward forever prevented by the innumerable future estates which the caprice or vanity of some owners would prompt them to create. A limit has, therefore, been fixed on for the creation of executory interests, and every executory interest which might, under any circumstances, transgress this limit is void altogether. *If no lives are fixed on then the term of twenty-one years only is allowed.*' Williams on Real Property (6th Am. Ed.), 317. 'The rule is that where the testator fails to avail himself of lives in being, and adopts a term of years, without reference to any life in

being, the term cannot extend beyond twenty-one years from his death.' Johnston's Est., 185 Pa. 179.

". . .

"A privilege to acquire such right [under the option] was given by the Barton deed, but no such right was conveyed thereby. The event upon which the estate is to arise, to wit, the acceptance of the option to purchase, is uncertain, being unconfined as to limit of time. The interest created by this option, therefore, is not vested but contingent, and is within the rule against perpetuities. In that respect this case differs from one where the owner of land conveys the coal thereunder, with general mining rights and the right to use surface for mining purposes, as in Dewey v. Great Lakes Coal Company, 236 Pa. 498, cited by counsel for the defendants. In a case like that the rights are conveyed by the deed and vest immediately. There a present fixed right of future enjoyment is conveyed, although the right of enjoyment may not be exercised immediately.

". . .

". . . By its terms the option . . . is limited only by the confines of eternity. We cannot conceive of a more violent breach of the rule against perpetuities. . . . And the rule must be rigidly enforced. In Coggins' App., 124 Pa. 10, Mr. Chief Justice PAXSON designates the rule against perpetuities as a 'rule of property founded upon the highest considerations of public policy, and *too firmly imbedded in our system of jurisprudence to be disturbed save by an act of assembly.*'

". . .

"3. The option or right to purchase in this case constitutes a cloud upon the title of the plaintiffs which they are entitled in equity to have removed by cancellation."

This Court, in its Opinion in *Barton v. Thaw,* said (page 366): "The covenant in question was declared to be void because in violation of the rule against perpetuities. We quite agree with the learned court below that it would be difficult to conceive any case which could be deemed more violative of the rule and a greater hindrance to alienation than the one a bar. The case turns very largely upon the character of the interest in the surface which the optionees took under the covenant. If it was a present fixed and vested interest in the land the rule against perpetuities would have no application. *But is a mere option to purchase land, unlimited as to time and indefinite in duration, which may be exercised in ten years, or in a hundred years, or in a thousand years, or which may never be exercised at all, depending upon the wish or pleasure of the optionee, a present vested interest? To ask this question would seem to answer it. In no proper legal sense can a mere privilege of exercising a future right to purchase be deemed a present vested interest in land.* The optionees may never exercise their option, and failing to do so, they would never acquire a vested interest in the land."

Barton v. Thaw has been cited with approval in *Mather Estate,* 410 Pa. 361, 189 A.2d 586 (1963); *Newlin Estate,* 367 Pa. 527, 80 A.2d 819 (1951); *Lockhart's Estate,* 306 Pa. 394, 159 Atl. 874 (1932); *Lilley's Estate,* 272 Pa. 143, 116 Atl. 392 (1922); *Vilsack v. Wilson,* 269 Pa. 77, 112 Atl. 17 (1920); *Green v. Green,* 255 Pa. 224, 99 Atl. 801 (1916); *Caruthers v. Peoples Natural Gas Company,* 155 Pa. Super. Ct. 332, 38 A.2d 343 (1944); *Morgan v. Griffith Realty Co.,* 192 F.2d 599 (10th Cir., 1951); and *Middleton v. Western Coal & Mining Co.,* 241 F. Supp. 418 (W.D. Ark.). See also: *Lewis Estate,* 349 Pa. 571, 37 A.2d 482; *Ledwith v. Hurst,* 284 Pa. 94, 130 Atl. 315.

The Majority has ignored this clear and well settled law of Pennsylvania and relies instead on Section 401 of

the Restatement of the Law of Property, which states that "A transaction which is *exclusively contractual* is not subject to the rule against pereptuities." *Of course, this is not controlling* but even if it were, an examination of the Illustrations and Comment under Section 401 clearly and without the slightest doubt demonstrates that the Section does not apply to the type of contractual right asserted here by SEPTA. The rationale of Section 401 is set forth in the Comment to that Section:

"a. Rationale. The rule against perpetuities has as its sole objective the prevention of 'inconvenient fetterings of property' (defined in § 370, Comment c). When a transaction is '*exclusively contractual*' (defined Comment b) it involves no fettering of any property and hence there is no occasion for applying the rule against perpetuities thereto."

But an option does involve the fettering of property and certainly the 1907 Option provision did! As Corbin points out in his Treatise on Contracts (Vol. 1A, page 481): "When an owner, by an Option Contract, gives to a promisee an Option to Purchase for a stated period, he has restrained alienation for that period, . . ." That is precisely why this Court held in *Barton v. Thaw,* 246 Pa., *supra,* that the Rule against Perpetuities applies to option contracts. The 1907 City-PTC Agreement not only gives the City a right, during an unlimited future, to purchase the franchises and other properties of the PTC, but further prohibits the PTC from "parting with any of its stocks, leaseholds or franchises without [the City's] consent." It is difficult to imagine a greater fettering of alienation of property.

The restrictive effect of the option in this case is further emphasized by the fact that, as *the City and SEPTA claim, the City's right to purchase could be exer-*

cised at any time in the future without limit. Could any statement or contention more clearly demonstrate that this Option unquestionably violates the Rule? Poetically expressed, the Option may be exercised at any time before the stars are old and the sun grows cold and the leaves of the judgment book unfold.

The majority Opinion next states that "*If* the 1957 agreement is a conveyance under that definition, the Estates Act of 1947 applies, . . . for the option was in fact exercised within the time limitation of the rule against perpetuities dating from July 1, 1957." The Estates Act of 1947 took effect January 1, *1948* and applies "*only to conveyances effective on or after that day.* As to conveyances effective before that day, the existing laws shall remain in full force and effect."

The 1957 Agreement does not give the City a new option or right to purchase, nor does it expressly modify the original Option given in 1907. Furthermore, (1) an option has never heretofore been "a conveyance," and (2) an option does not create a legal or equitable title in property: *Synes Appeal,* 401 Pa. 387, 394, 164 A.2d 221; and (3) an option *is not* "a conveyance" as defined in the Estates Act of 1947. It is clear that prior to any exercise of the Option by the City under Paragraph Eleventh of the 1907 Agreement, the optionee *had no interest, legal or equitable,* in or to the property subject to the Option, and a right which is void ab initio cannot be revived by one or even by both of the parties.

Finally, the Majority states that the Option should be upheld on the grounds of public policy. It disposes of the Rule against Perpetuities in two sentences: ". . . *Barton* stated at 246 Pa. 364 that its result is dependent on the interests of the community at large. In this case, the danger of fettering the free use of property is outweighed

by considerations of public concern and welfare." The Majority has mistaken the principle of public policy and has blindly put the shoe on the wrong foot. SEPTA, *if* ably managed (which, because of its multifarious functions and the varied and complicated problems which are certain to arise, is doubtful of accomplishment) is a desirable objective and a worthwhile public policy, but *that does not and cannot legalize the violation of any law or the destruction or abolition of the public policy of the Commonwealth, or the evasion of the many controlling decisions of this Court to the contrary.* The Majority cites no authority to support it and obviously proceeds on the recently adopted theory that a worthy objective validates and Constitutionalizes anything and everything, and every case is to be decided on a personal ad hoc basis. This substitutes uncertainty and confusion for certainty, clarity and stability, as well as for long-established and well-settled law, and borders on the ridiculous. I believe, although no one can be sure from the majority Opinion, that the practical result of that Opinion on this point is to judicially exterminate the Rule against Perpetuities, which it now writes off as "gone with the wind."

Barton v. Thaw, 246 Pa., supra, makes it crystal clear that there are compelling public policy reasons for not permitting unlimited restraints on alienation of property. Furthermore, the public interest of the City and also of SEPTA is adequately and completely protected by the fact that the City and SEPTA may condemn the entire transportation system if, in the public interest, either so desires.

In addition, the Majority conveniently overlooked the fact and the law that neither a Muncipality nor an Authority is a Sovereign, and what might apply to a Sovereign does not apply to a Municipality or an Authority. A Municipality, not only in its private or proprietary but even in

its *governmental* capacity, has no vested rights in its functions or powers and is Constitutionally subject to change, repeal or total abolition at the will of the Legislature. In *Lighton v. Abington Twp.*, 336 Pa. 345, 9 A.2d 609, the Court, in an Opinion by Justice LINN, said (pp. 352, 353): "In *Commonwealth v. Moir*, 199 Pa. 534, at p. 541, 49 A. 351, MITCHELL, *J.*, said: 'Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania.' See also *Shirk v. Lancaster*, 313 Pa. 158, 162, 169 A. 557." Accord: *Cleaver v. Board of Adjustment*, 414 Pa. 367, 200 A.2d 408; *Schultz v. Philadelphia*, 385 Pa. 79, 83, 122 A.2d 279; *White Oak Borough Authority Appeal*, 372 Pa. 424, 427, 93 A.2d 437; *Genkinger v. New Castle*, 368 Pa. 547, 549, 84 A.2d 303; *Philadelphia v. Fox*, 64 Pa. 169, 180-181.

It is equally true that in its *private* or *proprietary* capacity a municipality is subject to the same duties and obligations as is a private corporation. Said the Court in *Commonwealth v. PRT*, 287 Pa. 70, 134 Atl. 452, at page 76: "Our cases are numerous in which it has been held that, where the municipality is not engaged in public business, it acts as do others likewise engaged, and is subject to the same duties and obligations as to its contracts and the responsibility for the acts of those employed by it: [citing cases]." In that particular case, the Court held that the City was engaged in its private or proprietary capacity, and

not in its public or governmental capacity, in the operation of transit facilities leased to PRT.

Declaratory Judgment Proceedings.

2. A declaratory judgment proceeding is not a proper remedy and cannot be granted in this case because both the majority of this Court and the Court below *reform* the Option and grant SEPTA, contrary to the clear and express terms of the Option, the right to make payment and settlement within a period of not less than six months after the final disposition of this case, in lieu of the time period expressly and specifically required by the Option: *Baskind v. National Surety Corp.*, 376 Pa. 13, 16, 101 A.2d 645. Cf. also *McWilliams v. McCabe*, 406 Pa. 644, 657-8, 179 A.2d 222.

The proper remedy in this case, assuming that the City and SEPTA wish to exercise whatever rights either possesses, would be (a) a bill in equity for specific performance, which could include an extension of the time for settlement, or (b) condemnation by eminent domain.

For the aforesaid reasons, I would reverse the judgment and the Order of the lower Court and dismiss the petition for a declaratory judgment.

Assuming arguendo that SEPTA has the legal right to exercise the City's aforesaid options, and that a Declaratory Judgment proceeding will lie, I would construe the City's Option formula as follows:

First: SEPTA must assume the unfunded pension obligations of PTC. This subject was not covered in the Option or in any other part of the Agreements and was never within the contemplation of the parties. Section 24 of the Act of August 14, 1963, P.L. 984, as amended, 66 P.S. § 2024, requires that SEPTA "shall recognize and be bound by existing labor union agreements where they exist between

labor unions and transportation companies that are acquired, purchased, condemned or leased by the board." Moreover, these unfunded pension obligations have always been treated by PTC with the approval of the City and of the Pennsylvania Public Utility Commission *as a current operating expense when actually paid.* It is therefore fair, equitable and just that PTC's pension obligations be assumed by SEPTA. Cf. *Pittsburgh v. Pa.* P.U.C., 370 Pa. 305, 88 A.2d 59, 82 P.U.R. (n.s.) 161.

Furthermore, there is a stronger and even more compelling reason why SEPTA must assume the pension obligations. The City's Option provides in the clearest language that the City must pay the PRT stockholders (for all the Company's property, lock, stock and barrel) "an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, *and* the amount of the then undistributed corporate surplus, if any, of Company." The Option makes it mandatory to pay the stockholders (an amount equal to) $10 a share—not $10 conditionally or subject to any deductions whatsoever—*and in addition* thereto the amount of said surplus, if any. If no undistributed corporate surplus exists or if the liabilities exceed the assets, the City under said Option must pay $10 per share, which, in no event, can be reduced by pensions or by any other liabilities real or assumed, vested or contingent. The Majority's interpretation, which would greatly reduce or completely eliminate said $10 per share, completely ignores and violates this clear provision of the Option and radically alters the terms of the City's Option.

For these reasons, as well as for the reasons so ably set forth in Justice ROBERTS' Opinion, I specifically dissent to this part of the majority Opinion.

Second: Item (4)(d) of the purchase price formula (as used in this Option), namely, "and the amount of the

then undistributed corporate surplus, if any, of Company [PTC]" is difficult to interpret. There is no designation of surplus on the books of PTC under the heading "undistributed corporate surplus" or "corporate surplus," or merely "surplus." The headings nearest thereto are carried on its books as "capital surplus" and "retained earnings." The meaning of "corporate surplus" is at times indefinite and uncertain and is dependent on the particular agreement or particular Act (as the case may be). However, I agree with the Opinion of the Majority to the extent that the prima facie intent and the general rule means "the corporate surplus shown on the balance sheet of the Company."

In *Branch v. Kaiser,* 291 Pa. 543, 549, 140 Atl. 498, 500 (1928), this Court followed and adopted the following general rule which was thus stated in *Edwards v. Douglas,* 269 U.S. 204, 214:

". . . The word '*surplus*' is a term commonly employed in corporate finance and accounting *to designate an account on corporate books.* . . . The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. *This surplus* may be '*paid-in-surplus,*' as where the stock is issued at a price above par; it may be '*earned surplus*' as where it was *derived wholly from undistributed profits; or it may,* among other things, *represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property.* . . . ."

Moreover, it is a matter of common knowledge that a corporation changes from time to time the carried or book value of its corporate or capital surplus, and the methods or factors for determining the same, and further that the Federal Government or the State Government has at times employed a different formula for the ascertainment

thereof. Consequently, I believe that "undistributed corporate surplus" means prima facie "book value," but that the various assets of the Company may be revalued and their actual value established by relevant and convincing evidence.

I believe and would hold that the "undistributed corporate surplus" means (a) PTC's retained earnings, and (b) its capital surplus as shown on the books of the Company at the date of settlement, or its actual capital surplus on that date as proved by a revaluation thereof.

DISSENTING OPINION.

ROBERTS, *J.* FILED: July 27, 1967

The majority opinion, as it frankly states, is merely a highlighting of the opinion of the court below; indeed the majority seems to adopt that opinion in toto. Of necessity, therefore, my disagreement must be with the source of this Court's opinion.

1. Perhaps the most inequitable aspect of the Court's disposition is its saddling PTC with the obligation of paying future pension rights due its retired employees, thereby depriving PTC's stockholders of approximately $17,000,000. As a result the amount they will actually receive for their stock will be considerably less than the $10.00 per share envisioned by the 1939 formula. Indeed the amount required to meet the pension fund obligation is practically equal to the amount received in exchange for PTC's stock. Thus the effect of the disposition on this aspect is to wipe out entirely Item 3 of the option formula.

Yet in choosing to exercise its option, SEPTA is obligated to take over PTC as an operating transportation system in its entirety. Logically this ought to include PTC's pension obligation. "Pensions are wages and constitute a present benefit, and therefore upon the establishment of a pension plan, whether based on past or future services, or both, the entire charge becomes an operating expense not an income deduction or a charge to surplus." *Re: Uniform System of Accounts for Electric Corporations,* 82 P.U.R.(NS) 161 (N.Y. 1950). In *Pittsburgh v. Pennsylvania Public Utility Comm'n,* 370 Pa. 305, 88 A.2d 59 (1952), this Court held that the burden of pension pay-

ments, including those attributable to past services, should be assumed by present and future ratepayers, rather than the stockholders. The following paragraphs from the Court's opinion seem to me to be equally applicable to the present case:

> "The Superior Court and the City of Pittsburgh rely upon the argument that a decision allowing the 'freezing payments places a burden on present and future ratepayers which should have been borne by those in the past. It is obvious, as the City argues and the Superior Court stated, that as a result of the Commission's decision present and future ratepayers must pay that portion of the cost of pensions which is more properly attributable to past services. *But the criterion for determining whether present and future ratepayers or the investors in Bell should bear this portion of the cost is not whether past ratepayers should have paid it.* If it were, it was illogical for the Superior Court to permit the Company to allow that portion of the pension costs attributable to services rendered between 1913 and 1927 since such costs should have been placed upon ratepayers between those years. Furthermore, even the ratepayers in 1913, by that test, should not have borne the amount which was paid out in pensions on a pay-as-you-go basis and which was attributable to services rendered before 1913.
>
> "Reduced to its simplest terms, the situation is this. *Pensions are now recognized as a proper operating expense.* It is fundamental that in order to afford an adequate retirement program any pension plan must take into consideration past services of employes: Osborne et al. v. United Gas Improvement Co. et al., 354 Pa. 57, 63, 64, 46 A. 2d 208. Someone must pay

for the pension costs properly attributable to past services. At the present time such costs can be placed upon present and future ratepayers or the investors in the Company. In the present situation the test for determining where the burden should be placed as between these two classes of individuals is whether management abused its discretion in 1927 by not placing the full cost on the ratepayers from that time on. If they did, the investors for whom they acted should bear the cost. If they did not, there is no valid legal objection to placing the burden on present and future ratepayers. Since we have already demonstrated it cannot properly be held that management abused its discretion in 1927, the costs of pensions including the freezing payment were correctly included by the Commission as an operating expense.

"The view which we take of this phase of the case is supported by ample authority. On the other hand, the contention of the City of Pittsburgh that these pension costs should be borne by the Bell stockholders is not supported by a decision of any court of last resort. . . ."

370 Pa. at 320-21, 88 A.2d at 66-67. (Emphasis supplied and footnote omitted.)

PTC has always followed the normal procedure of treating the pension obligations as part of its current operating expense. Accordingly these obligations have been reflected in its current rate structure. For over twenty-five years this has been done with express knowledge and approval of the City of Philadelphia, SEPTA's assignor, who during this entire period was represented on PTC's Board of Management. Moreover, PTC's handling of its pension obligation had the approval of the Pennsylvania Public Utilities Commission. It seems to me, there-

fore, to be totally irrelevant to the issue before us for SEPTA to suggest that if it had been in control of PTC's management, it would have made different arrangements in order to meet its pension obligation. Had SEPTA chosen to acquire PTC by means of condemnation, the price SEPTA would have paid would have included the value of PTC's past pension obligations. Metropolitan Transportation Act, Act of August 14, 1963, P.L. 894, § 8, 66 P.S. § 2008(f)(24)(1)(iii). In exercising the option SEPTA is purchasing PTC "lock, stock, and barrel," and is obligated to purchase it as it is—not as it might have been.

In addition, SEPTA's failure to assume PTC's pension obligation is in conflict with the legislative intention set forth in the statute creating SEPTA, Metropolitan Transportation Authorities Act, Act of August 14, 1963, P.L. 894, 66 P.S. § 2001 et seq. Section 24, 66 P.S. § 2024 provides that SEPTA "shall recognize and be bound by existing labor union agreements where they exist between labor unions and transportation companies that are acquired, purchased, condemned or leased." It is evident that the legislature was thus concerned with the welfare of the transportation companies' employees. The existing union agreement specifically provides that retired employees shall "continue to receive benefits in accordance with the provisions of the contracts which were in effect at the times of their respective retirements on pension." Yet, as the amicus brief points out, SEPTA can hardly be bound by this provision of the union contract, which it assumes on the settlement date, and at the same time insist that retired employees look not to it, but to PTC, for their benefits.

Thus I believe the Court's treatment of the $17,000,000 pension obligation is doubly burdensome. First, it retroactively compels PTC to utilize past earnings in order to

pay for future obligations. This is not only contrary to the manner which PTC, with the express approval of the City and the P.U.C., has in the past treated said obligations, but also contrary to the intent of the 1939 agreement itself. Secondly, since these pension obligations have always been met on a pay-as-you-go basis, it contravenes the legislative intention by unnecessarily depriving retired employees of the security of the fare-box.

2. Under the 1939 agreement, the purchase price of PTC's entire operations is to be determined in accordance with a four factor formula contained therein. The only dispute concerning this formula is the meaning of the term "undistributed corporate surplus." I am unable to agree with either SEPTA's definition, adopted by the Court, that undistributed corporate surplus means only the balance sheet figure described as retained earnings, or PTC's definition that the term means the excess of the fair valuation of all the assets over the liabilities plus capital stock, thus requiring all the assets to be valued prior to their inclusion in the formula.

PTC derives its position from the classic definition of corporate surplus in *Edwards v. Douglas,* 269 U.S. 204, 46 S. Ct. 85 (1925), and approved by this Court in *Branch v. Kaiser,* 291 Pa. 543, 549, 140 Atl. 498, 500 (1928):

> "The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an account on corporate books. But this is not true of the words 'undivided profits.' The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in-surplus,' as where the stock is issued at a price above par; it may be 'earned surplus' as where it was derived wholly from undistributed profits; or it

may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's property." 269 U.S. at 214, 46 S. Ct. at 88.

While I have no quarrel with this definition, I believe that it is inapplicable in the present case because the entire purpose of the 1939 agreement was to establish a fixed formula which would permit the buyer to know the price he would have to pay at the time he exercised his option. *Philadelphia v. Philadelphia Transp. Co.*, 386 Pa. 231, 239, 126 A.2d 132, 135-36 (1956). A valuation proceeding after the option is exercised, as PTC urges, would defeat this purpose; hence I agree with the court below that "undistributed corporate surplus" is not a valuation but a balance sheet figure.

On the other hand, the conclusion that undistributed corporate surplus is limited to the retained earnings of PTC is a non sequitur. In my view, which incidentally is supported by the opinion of the court below, the purpose of the formula price was not only to permit the optionee to purchase the company at a known price but also to insure PTC's stockholders that in the event the option was exercised their equity in the corporation as the same appeared on the company's books would at least be returned to them. On its books, PTC has divided its stockholders' equity into three catagories: 1) capital stock, for which the formula compensates the stockholders by requiring the purchaser to pay $10.00 per share for each outstanding share of stock; 2) retained earnings, for which, under the opinion of the court below, the stockholders are compensated for by its inclusion in the term undistributed corporate surplus;" 3) capital surplus, for which under the Court's determination the stockholders receive no compensation.

I can see no justification for giving SEPTA the capital surplus as a windfall. This account is not a recently created entry but has had the unchallenged acceptance and approval of both the City and the P.U.C. for more than a quarter of a century. Every advantage of a known certainty which is true about the retained earnings balance sheet figure is equally true about the capital surplus account. As the court below observed: "There was no fraud or deceit—either alleged or proved—in the way PTC kept its books. The essence of the formula price, as had been seen, is that it is a book price. SEPTA is therefore bound to accept PTC's books in computing the formula price."

Accordingly, I would hold that the term "undistributed corporate surplus" as used in the 1939 formula means PTC's retained earnings and capital surplus as reflected on its balance sheet at date of settlement.

3. Additionally, I am disturbed by the uncertainty generated by the Court's treatment of PTC's current cash and liabilities. All agree that under the agreement SEPTA will purchase PTC's cash as well as its other assets, and that PTC is liable for the excess of its current liabilities over and above its current cash. However, there is considerable uncertainty as to what the Court's disposition is with regard to PTC's current cash and liabilities. As I read the opinion of the court below, on the one hand, it permits PTC to pay its current liabilities before settlement date, thereby reducing the amount of cash transferable to SEPTA. Presumably, PTC could liquidate all its cash by satisfying as much of its current liabilities as the cash would cover. It is also possible for SEPTA and PTC to make an arrangement so that SEPTA will assume the current liabilities to the extent of PTC's current cash account thus not necessitating PTC to dispose of its cash in a desperate effort to meet a settlement deadline. On the other hand, the court

states that if for any reason no such agreement is made PTC remains responsible for any liabilities existing on settlement date even though in its cash account there is an amount which could theoretically be utilized to reduce current liabilities.

In my view this confusion, which is not necessary and could produce a most inequitable result, should, especially in view of the intensity of this litigation, be clarified. Under the Court's decree SEPTA has six months in which to raise the money to purchase PTC. Under these circumstances PTC might not know until settlement date whether or not SEPTA will actually secure the necessary funds to assume control of its operations, and it may be impossible for PTC to settle its current liabilities on such short notice. On the other hand, if SEPTA fails to purchase the company, PTC may find itself with an inadequate cash position with which to properly operate the transportation system. I see no problem in making it crystal clear that the current cash is to be applied to the payment of current liabilities. On the settlement date SEPTA should only receive that portion of current cash which is in excess of PTC's current liabilities, unless there is an agreement that SEPTA will assume an amount of current liabilities equal to the amount of current cash it obtains.

Mr. Justice O'Brien joins in this opinion.

APPENDIX B.

Opinions of the Supreme Court of Pennsylvania Affirming the Preliminary Injunction.

FILED: July 27, 1967

PER CURIAM.

Decree affirmed.

Mr. Justice Roberts files a dissenting opinion in which Mr. Chief Justice Bell and Mr. Justice O'Brien joins.

Dissenting Opinion

FILED: July 27, 1967

ROBERTS, *J.*

In view of the decision in the declaratory judgment action between the same parties, decided today, the issues raised by this appeal have become moot. I would therefore dismiss this appeal without expressing any views as to the propriety of the restraining order.

Mr. Chief Justice Bell and Mr. Justice O'Brien join in this dissent.

APPENDIX C.

Opinions of the Supreme Court of Pennsylvania in Previous Appeal.

PER CURIAM. November 29, 1965.

This is a declaratory judgment proceeding seeking a determination: (1) of the validity and enforceability of a provision in a contract consummated in 1907, as amended, giving the City of Philadelphia the right to purchase "all the property and franchises" of the Philadelphia Transportation Company; and, (2) the formula to be applied in determining the purchase price, as provided for in the contract.

This appeal, under the Act of March 5, 1925, P.L. 23, § 1, 12 P.S. § 672, questions the jurisdiction of the court to resolve the issues involved in a declaratory judgment proceeding.

Our examination of the record is convincing that the lower court properly overruled the jurisdictional objection, and that every issue, presently pertinent, is correctly and adequately answered in the excellent opinion of the court below.

Order affirmed.

Dissenting Opinion by Mr. Chief Justice Bell

It is apparent from the written record and certainly from the oral argument that this case is bristling (1) with disputes and conflicts of many material and complex facts,* and (2) with mixed questions of fact and law, and (3) with a number of highly controversial legal issues which are not

* This involved a total of over $15,000,000.

"decidable" in this proceeding. Under such circumstances, or, indeed, if a dispute as to material facts exists "or such controversy may arise," or if another appropriate remedy is available, we have always hitherto held that a declaratory judgment proceeding will not lie. *Sheldrake Estate,* 416 Pa. 551, 553, 207 A.2d 802; *Mohney Estate,* 416 Pa. 107, 109, 204 A.2d 916; *Carlsson v. Pa. General Ins. Co.,* 417 Pa. 356, 207 A.2d 759; *State Farm M. A. Ins. Co. v. Semple,* 407 Pa. 572, 180 A.2d 925; *Allstate Ins. Co. v. Seward,* 407 Pa. 628, 631, 182 A.2d 715. See also: *McWilliams v. McCabe,* 406 Pa. 644, 179 A.2d 222; *Keystone Ins. Co. v. Warehousing and Equipment Corp.,* 402 Pa. 318, 320-322, 165 A.2d 608; *Stofflet & Tillotson v. Chester Housing Authority,* 346 Pa. 574, 578, 31 A.2d 274.*

In *Sheldrake Estate,* 416 Pa., supra, the Court, quoting from *Mohney Estate,* 416 Pa., supra, said (pages 553-554):

" '(1) While the grant of a petition for a declaratory judgment is a matter of sound judicial discretion:

" ' "This Court now adheres to the view that declaratory judgment proceedings must not be entertained if there exists another available and appropriate remedy, whether statutory or not: McWilliams v. McCabe, 406 Pa. 644, 179 A.2d 222; State Farm Mutual Automobile Insurance Co. v. Semple, 407 Pa. 572, 180 A.2d 925." Lakeland Joint School District Authority v. Scott Township School District, 414 Pa. 451, 200 A.2d 748.

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* *Stevenson v. Stein,* 412 Pa. 478, 195 A.2d 268, is clearly distinguishable because, as the Court in that case said (page 481): ". . . it is clear that this is an unusual and not the 'ordinary' case. Moreover, no other 'appropriate' remedy is available." Furthermore, *Lakeland Jt. Sch. D.A. v. Scott Twp. Sch. D.,* 414 Pa. 411, 200 A. 2d 748, which is relied upon by the lower Court, is clearly distinguishable, not only because of its very unusual facts but also and more importantly because "there is no other appropriate and available remedy nor are any facts in dispute."

" 'In State Farm Mutual Automobile Insurance Co. v. Semple, 407 Pa., supra, the Court said (pages 574-575): "The principles to guide the lower courts in determining whether or not a declaratory judgment proceeding should be entertained was recently clarified by this Court in McWilliams v. McCabe, 406 Pa. 644, 179 A.2d 222 (1962). Therein we declared, inter alia, (1) that a declaratory judgment proceeding is not an optional substitute for established and available remedies; (2) that it should not be granted where a more appropriate remedy is available; (3) that it should not be granted unless compelling and unusual circumstances exist; (4) that it should not be granted where there is a dispute of facts, or such controversy may arise; and (5) that it should not be granted unless there is a clear manifestation that the declaration sought will be a practical help in terminating the controversy." "

The majority now ignore, evade, undermine and impliedly overrule over a half-dozen recent decisions of this Court and the tests and principles therein set forth. This is especially regrettable and unjustifiable because Equity furnishes—what this declaratory judgment proceeding does not and admittedly cannot possibly furnish—a full, adequate, complete and final remedy. This can be attained by, and only by, a complaint for specific performance with appropriate prayers.

Moreover, a declaratory judgment proceeding will not lie for the additional reason that all indispensable parties have not been joined in this proceeding: *Carlsson v. Pa. General Ins. Co.*, 417 Pa., supra (pp. 356, 357); *Mohney Estate*, 416 Pa., supra (p. 110); *Ladner v. Siegel*, 294 Pa. 368, 372, 144 Atl. 274.

For each and all of these reasons, I strongly dissent.

APPENDIX D.

Opinion of the Trial Judge in Support of the Declaratory Judgment.

ABSTRACT OF THE CASE

In one way, this case is like a pretty girl, who is vain. It cannot be described briefly. Nor should it be.

It cannot be, because it starts in 1857, and winds through five agreements—of 1907, 1939, 1957, 1962, and 1965—and a corporate reorganization that was in the Federal Courts and before the Public Utility Commission for years. It should not be, because it is too important. A great deal of money is at stake—many, many millions of dollars. And the City of Philadelphia and its surrounding communities may develop differently, depending upon how this case is decided. Moreover, a Court should not only decide. It should explain. Therefore, as best it can, this Court will state and respond to the arguments that have been made; but the arguments rise like bees, and many pages will be needed, which few persons will wish or have time to peruse. Yet they are entitled to know in general what the case is about. This abstract is for them.

The two main questions are: Shall PTC be obliged to keep its promise to sell its transit system, upon any July 1st, after six months notice, to the City's assignee, SEPTA? And if so, what must SEPTA pay?

PTC seeks to avoid its promise by invoking the common law rule against perpetuities. The rule was invented by the Courts to prevent property being tied up too long. Since this evil is not threatened here, the rule will not be applied here. Even if the rule were applied, it would not invalidate the City's right to purchase PTC, for the Estates

Act of 1947 liberalized the rule so as to save the City's right. Therefore, PTC must keep its promise to sell.

But, PTC says, it need not sell to SEPTA, for when the City assigned its right to SEPTA, the City did not seek competitive bids. The Philadelphia Home Rule Charter does require competitive bids in many situations, but not here; and, the basic point, when the Charter was adopted, PTC's contract to sell to the City or its assignee was exempted.

A minority of PTC's shareholders have asserted that the assignment to SEPTA could not have been made except that someone committed fraud, or made a mistake. Now that they have had their day in Court the record is clear that there was no fraud or mistake.

The price that SEPTA must pay is a fixed price, set by a formula in the contract. PTC's argument that the price is to be determined by a valuation of its assets is in the teeth of the contract, which provides that the transit system may be acquired in either of two ways: by condemnation, where there would be a valuation of PTC's assets, or by purchase at the formula price.

Under the formula SEPTA must pay three amounts: (1) the amount of PTC's liabilities that are in the form of bonds, mortgages, and ground rents; (2) $10 for each share of PTC's outstanding stock; and (3) PTC's "undistributed corporate surplus."

The only element of the formula about which there can be reasonable dispute is "undistributed corporate surplus." On balance, however, it seems clear that this means earned surplus and retained earnings, which could be distributed as dividends, and does not include capital surplus. SEPTA does not want to pay for PTC's earned surplus, but wants to extinguish it by charging against it PTC's pension obligation to retired PTC employees.

SEPTA will not be allowed to do this, but must pay for the earned surplus, as required by the formula. However, neither will PTC be permitted to shift its pension obligation to SEPTA, for the formula does not require SEPTA to assume such a liability.

"It is a presupposition of the whole economic order," Roscoe Pound once said, "that promises will be kept." PTC must keep its promise. It will be so ordered.

OPINION

SPAETH, *J.*

NATURE OF THE CASE

The Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia have petitioned for a declaratory judgment to determine whether SEPTA as the City's assignee has the right under certain agreements to buy the assets of the Philadelphia Transportation Company (PTC), and if it does, what is the meaning of a certain formula that states the price to be paid for the assets.

HISTORY OF THE CASE

SEPTA and the City filed their petition for declaratory judgment on June 18, 1965. On July 6 PTC filed an answer raising questions of law concerning jurisdiction. On August 27 this Court dismissed the answer and ordered PTC to file an answer on the merits. PTC appealed to the Supreme Court. By an opinion filed on November 29 the Supreme Court affirmed this Court's order *per curiam*, Mr. Chief Justice Bell dissenting. *S.E. Trans. Auth. v. Phila. Trans. Co.*, 419 Pa. 471 (1965).

On December 13 PTC filed its answer on the merits to the petition for declaratory judgment. On December 14 certain minority shareholders of PTC filed a petition for leave to intervene, on which a rule was allowed, returnable December 20. The rule was not heard, however, but was continued, for shortly after PTC filed its answer on the merits, its attorneys and the attorneys for SEPTA and the City entered into settlement negotiations. The negotiations continued into the early part of 1966, when a settlement was agreed upon subject to the approval of PTC's share-

holders.* On April 26 the shareholders met and voted to reject the settlement.**

With SEPTA's and the City's petition for declaratory judgment thus renewed, a pretrial conference was held by this Court on May 3, and trial was set for May 9. Also on May 3 the minority shareholders' petition for leave to intervene was heard. The petition was denied by order of May 5, with leave to file an amended petition on May 6. An amended petition was filed. It was heard on May 9 and denied on May 10. The minority shareholders appealed the denial to the Supreme Court, and asked this Court to issue a supersedeas to stay the trial until the appeal was disposed of, which normally would have been after argument to the Supreme Court in November, 1966. The request for a supersedeas was denied, whereupon PTC petitioned the Supreme Court for a writ of prohibition. The Supreme Court allowed a rule on the petition, returnable May 13. This Court made its return to the rule on May 12. The Supreme Court ordered that

> "And Now, May 13, 1966, because of the very exceptional circumstances in this matter and the tremendous public importance of this litigation and the issues raised therein, the appeal is sustained. The case is hereby remanded to the lower Court with directions
>
> (1) (a) to grant the amended petition to intervene, and

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* An incident of the negotiations was the cessation of an action in mandamus brought by SEPTA to require PTC to permit SEPTA to examine PTC's records. See this Court's decision in *SEPTA v. PTC*, 38 D. & C.2d 653 (1965), dismissing PTC's preliminary objections and requiring PTC to file an answer to SEPTA's complaint.

** The vote, which was 782,137 against the settlement to 778,654 for it, was not counted until May 2.

(b) to permit all the parties including the petitioning intervenors to present testimony and evidence, and

(2) to forthwith proceed to a hearing of this case and make appropriate findings and conclusions.

"The Petition for Supersedeas, together with a Rule to Show Cause why a Supersedeas should not be granted is denied.

"The Rule to Show Cause why a Writ of Prohibition should not be granted, issued by this Court on May 10, 1966, returnable on May 13, 1966 at 10:00 o'clock A.M., is hereby discharged.

"JUSTICE JONES did not participate in this matter.

"Justice COHEN and Justice EAGEN concur in the denial of the writ of prohibition and the refusal to grant supersedeas, but dissent from the balance of the Court's Order."

A hearing was held according to this order. The hearing started on May 16 and extended through June 3. SEPTA and the City presented their case on May 16 and 17, PTC presented its case on May 17 through June 2, and the intervenors presented theirs on June 2 and 3; SEPTA and the City presented rebuttal on June 3. Briefs and requests for findings of fact and conclusions of law were submitted, and on June 28 oral argument was heard.

QUESTIONS PRESENTED

The questions presented may be arranged in five sections, which is not always as the parties have arranged them, but which will be useful to an understanding of how the different parts of the case relate to each other.

1. SEPTA, as the City's assignee, seeks to buy PTC's assets under a reserved right of purchase stated in an agreement between the City and PTC of June 12, 1939. This agreement is an amendment of an agreement between the City and the Philadelphia Rapid Transit Company (PTC's predecessor) of July 1, 1907. PTC contends that the 1907 Agreement was void *ab initio* because of the rule against perpetuities, and that therefore so was the 1939 Agreement void. Whether this is so is the first question to be decided.

2. If the reserved right of purchase is not void because of the rule against perpetuities, it must next be decided whether it is void, or at least unenforceable, because it had expired or attempts to extend it were ineffective.

PTC contends that the exercise of the reserved right of purchase depends upon agreements between the City and PTC of July 1, 1957, July 5, 1962, and February 25, 1965, which "extended" the Agreements of 1907 and 1939, but that these "extension agreements" are invalid because never ratified by PTC's shareholders. Furthermore, PTC contends that under the Agreement of July 5, 1962, notice of intent to exercise the reserved right of purchase had to be by December 31, 1964, whereas in fact it was not until June 8, 1965, or, in PTC's view, too late.

In considering these contentions, the first problem will be whether the reserved right of purchase does depend upon the Agreements of 1957, 1962, and 1965. SEPTA and the City say it does not. In their view the right continued in effect until SEPTA exercised it on June 8, 1965, and the Agreements of 1957, 1962, and 1965 did not "extend" the right but rather recognized it. If this view is correct, the validity of the Agreements of 1957, 1962, and 1965 need not be considered. If it is not correct, it will

be necessary to decide whether the Agreements of 1957, 1962, and 1965 did require ratification by the shareholders, and if so, whether there was ratification, and if there was, whether the condition regarding time of notice was met.

Also to be considered with these questions will be the claim of the intervening minority shareholders. They say that the reserved right of purchase expired on December 31, 1964, and that its exercise, which was on June 8, 1965, therefore depended upon the Agreement of February 25, 1965, which, in the intervenors' view, was procured by "fraud, accident and mistake." SEPTA and the City deny any fraud, accident, or mistake.

3. If it is decided that the reserved right of purchase is valid, the third question to be considered involves the assignment of the right by the City to SEPTA. PTC contends that the assignment, which was on June 8, 1965, was invalid because it was made without public auction, which, PTC contends, was required by the Philadelphia Home Rule Charter. SEPTA and the City assert that the Charter does not require public auction.

4. The reserved right of purchase states a formula by which the price of PTC's assets is to be determined. One factor is "undistributed corporate surplus." If it is decided that SEPTA has properly exercised the right of purchase, it will be necessary to decide what "undistributed corporate surplus" means. SEPTA and the City contend that it means only the amount stated on PTC's balance sheet as "Retained Earnings." PTC replies that it means the present fair value of its assets as compared to its present liabilities; at least, PTC urges, "undistributed corporate surplus" includes not only PTC's "Retained Earnings" but also its "Capital Surplus" as shown on its bal-

ance sheet. SEPTA and the City further contend that in computing the amount of "undistributed corporate surplus" it is necessary to deduct the amount that would be needed, according to a footnote to PTC's balance sheet, to create a fund from which to pay pensions to retired PTC employees. PTC replies that there should be no deduction. SEPTA also contends that it should not have to pay PTC's financing and organization expenses, since PTC will retain its corporate franchise.

5. When SEPTA exercised the reserved right of purchase, it gave notice that it intended to buy PTC's assets on July 1, 1965. As part of the settlement negotiations, this date was extended to January 1, 1967. SEPTA contends that PTC's shareholders rejected the settlement because of improper conduct by one of PTC's directors and certain of its shareholders, with the consequent delay of the litigation now before this Court, and that this Court should, therefore, as part of its decree, further extend the date when SEPTA must pay for PTC's assets.

As will appear, the answers to these questions depend almost entirely upon conclusions of law, for except perhaps with respect to the fifth question (which may involve an issue of agency), there is no dispute about any pertinent fact; the disputes are rather about the legal consequences of facts (principally documents) either stipulated, or not denied, or of which judicial notice may be taken. Since this is a declaratory judgment proceeding, it is appropriate that this should be so, and that the issues should be legal rather than factual. Under extraordinary circumstances a declaratory judgment proceeding may resolve complex issues of fact. *Stevenson, Appellant v. Stein,* 412 Pa. 478 (1963). However, that will not be necessary here.

Discussion

A. *Preliminary Statement.*

Frequently the findings of fact precede the discussion of a case. Here, however, it will be better to start with the discussion; if the findings are stated afterwards, they will be more readily understood.

The central issue around which the present litigation rages is the meaning of the Agreement of 1907, as amended by the Agreement of 1939. These agreements were products of the history of public transit in Philadelphia. Unless the history is understood, the agreements cannot be understood. Accordingly, in the opening section of the discussion, the origin of the provisions of the Agreements of 1907 and 1939 will be stated, and the provisions of the Agreements will be compared to each other.

Once the history of the Agreements of 1907 and 1939 is understood, there is no difficulty in understanding them, or in understanding the Agreements of 1957, 1962, and 1965, and in the ensuing sections of the discussion, the questions about the various agreements as presented by this litigation will be considered, in the five sections, and in the order, in which the questions have been just stated above. After that, findings of fact and conclusions of law will be entered, with an order.

The provisions of the Agreements of 1907 and 1939, and their origin.

1. *Public transit in Philadelphia before the Agreement of 1907.*

On April 4, 1854, the Philadelphia and Delaware River Railroad Company (Frankford and Southwark Philadelphia City Passenger Railroad Company) was incorporated.* On January 20, 1858, it operated the first street

* P.L. 759.

railway car, a horse car, in Philadelphia, between 5th and 6th Streets.** From 1858 to 1874 at least eighteen more street railway companies were chartered.***

These street railway companies, with minor exceptions, owned the surface system in Philadelphia. They came to be known as "the underliers." Their franchises had no stated date of termination.(*) They were, however, subject to the Ordinance of July 7, 1857,(**) which provided

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** These facts will be found in Report of Transit Advisory Committee to General Conference on Transit Situation in Philadelphia, page 4, transmitted to the Honorable Harry S. McDevitt, President Judge of Court of Common Pleas No. 1, on May 24, 1930, and on file with the Philadelphia City Council and the Philadelphia Bar Association Law Library. See, too, the letter of September 30, 1937, from the Mayor of Philadelphia, the Honorable S. Davis Wilson, to City Council, Volume II of Journal of City Council, July 8, 1937, to December 29, 1937, Appendix No. 194, pages 353-355, in which the Mayor states that the conference before Judge McDevitt, and the appointment of consulting experts to report to the Judge, arose from a proposal that the City take over the entire transit system. Accordingly, it is appropriate for this Court to take judicial notice of the Advisory Committee Report. *Commonwealth v. Ball et al., Appellants,* 277 Pa. 301, 306 (1923) ("Judicial notice may be taken of the existence of public matters, such as general history known to the community at large, or salient facts of local history known generally in the particular community . . ."; notice therefore taken of "the actual origin of the highways as turnpikes"); and see: 14 P.L.E., "Judicial Notice", page 280 *et seq.;* Morgan, "Judicial Notice", 57 Harv. L.R. 269 (1944); Davis, "Judicial Notice", 55 Columbia L.R. 945 (1955), see also McCormick on Evidence §§ 323-331.

*** Act of March 25, 1858, P.L. 166; Act of April 9, 1858, P.L. 237; Act of April 10, 1858, P.L. 240; Act of April 13, 1858, P.L. 257; Act of April 15, 1858, P.L. 300; Act of April 16, 1858, P. L. 320; Act of April 21, 1858, P.L. 399; Act of April 21, 1858, P.L. 447; Act of March 26, 1859, P.L. 243; Act of March 28, 1859, P.L. 264; Act of April 1, 1859, P.L. 462; Act of April 6, 1859, P.L. 389; Act of April 8, 1859, P.L. 429; Act of April 12, 1859, P.L. 711; Act of May 16, 1861, P.L. 704; Act of April 8, 1864, P.L. 297; Act of April 16, 1866, P.L. 934; Act of February 10, 1869, P.L. 130. After 1874, when the new Pennsylvania Constitution was adopted, such special laws as these were prohibited. See Article 3, section 7, of the Pennsylvania Constitution.

(*) Advisory Committee Report, pages 4 and 25.

(**) Exhibit P-4.

in Section 3 "That all Railroad Companies . . . shall be at the entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street, avenue or alley occupied by them," and in Section 8 that "The Directors of any such Company . . . shall . . . file . . . a detailed statement . . . of the entire cost of the same; and the City of Philadelphia reserves the right at any time to purchase the same, by paying the original cost of said road or roads, and cars at a fair valuation." By other ordinances the City permitted electrification, reserving the right to order all wires, including trolley wires, to be placed underground.***

In 1883 the Legislature authorized the formation of traction companies.**** These companies did not have the power to build or own street railway companies but did have the power to lease, maintain, improve, and operate them. In 1883 the Philadelphia Traction Company was formed, and in 1893 the Electric Traction Company and the Peoples Traction Company were formed.*****

The underliers then proceeded to lease their perpetual franchises to the traction companies. Most of the leases were for 900 years or more, the underliers having a right of reversion. Typically a lease provided for turning over to the traction company all railway property, the underlier reserving only the right to continue its corporate existence and to receive the rental. Many of the leases contained strict maintenance and replacement clauses, with provisions

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*** Advisory Committee Report, page 25. And see *Philadelphia Western Railway Co.*, 143 Pa. 444 (1891), holding that the Ordinance of 1857 is to be "read into and made part of the [Girard College Passenger Railway Company's] charter" (143 Pa. at 471), and permitting the City to recover the cost of repaving that the City considered necessary but the Company had refused to do.

**** Act of June 13, 1883, P.L. 123, Section 6.

***** Advisory Committee Report, pages 4-5.

that in case of default the underlier could take over its property with additions and improvements.*

Between them, the Philadelphia, Electric, and Peoples Traction Companies leased almost all of the franchises of the underliers. "This done, they had the right to possess and operate their systems for 999 years for whatever profit they could make after meeting the rents. Their capital was spent on improvements to their leased systems, principally in electrification."**

In 1895 the Union Traction Company was formed. It effected the first consolidation of the transit system in Philadelphia "by taking over the leases and rental commitments of the three original Traction Companies and leasing them for 999 years at fixed annual rentals."*** Finally, in 1902, the Philadelphia Rapid Transit Company was formed, and it "leased Union Traction Company, taking over its existing leases and rental commitments."**** PRT also acquired certain franchises of its own for high speed lines and created subsidiaries for bus and taxi operations.

Thus, by 1902, a rigid pyramid of leases had been created: PRT leased from Union Traction; Union leased from the Philadelphia, the Peoples, and the Electric Traction Companies; and Philadelphia, Peoples, and Electric leased from the underliers, who had perpetual franchises. In *Citizens Passenger Ry. Co. v. Pub. Ser. Com.*, 271 Pa. 39, 43-44 (1921), Mr. Justice Simpson described this pyramid as follows:

> ". . . it was provided that the lessee company should carry out the terms and conditions of the pre-

* Advisory Committee Report, pages 21-23.

** Advisory Committee Report, page 5.

*** Advisory Committee Report, page 5.

**** Advisory Committee Report, page 5.

ceding leases, for which its lessors were responsible. Those contracts provided for specified rentals to be paid by the lessee to the lessors, sufficient to cover the fixed charges of the latter and a stated dividend to its stockholders; and, since the leases included the franchises of the original companies, the latter were denuded of everything except their mere corporate existence."

It was in these circumstances that the City and PRT made the agreement of 1907.*

2. *The Agreement of 1907.*

The first four recitals of the Agreement of 1907 summarize the history that has just been stated; these recitals also state that "The Company has . . . acquired . . . the franchises . . . for the construction of elevated and underground passenger railways within the city and has under construction and in partial operation an elevated and underground railway from the western end of Market Street along Market Street to Delaware Avenue, and also has franchises for the construction of a subway on Broad Street and an elevated railway to Frankford." The next three recitals state that

"And Whereas, The City should have a voice in the management of the Company and a supervision of its accounts and expenditures;

"And Whereas, A large sum of money is required to improve, complete and extend the present system of the Company in order that it shall better serve the public; and for this purpose it is essential that the posi-

* Exhibit P-1; the exact date of the Agreement is July 1, 1907. The City was given the power to make the Agreement of 1907 by the Act of April 15, 1907, copied as Exhibit P-3.

tion of the Company be clearly defined, and the securities of itself and its underlying properties unquestioned, and its right to make extensions in the future assured, in order that it may obtain credit to finance the increased transit facilities so necessary for the welfare of the public and the development of the City;

"And Whereas, It is desirable that arrangements should be made requiring the direct payment into the City Treasury of a fixed sum in lieu of a license fee per car, and a further sum to represent the cost of maintaining street pavements and caring for the streets occupied by passenger railway tracks, in order to enable the City to have control of this municipal work. And it is further desirable that provision should be made for the sharing by the City in the earnings of the Company from further growth of the City (without in any way making the City liable for any of the obligations of the Company), and the ultimate acquisition by the City of the leaseholds and property of the Company."

To achieve these objectives the City gave up its rights under the Ordinance of 1857 and the ordinances related to it: the right to require the PRT to repave the streets used by it; the right to require that PRT's wires be put underground; and, most important, "the right at any time" to purchase the underliers' perpetual franchises (which, as has been stated, had been leased up through the various traction companies to PRT). The surrender by the City of these rights was accomplished by the Ordinance of July 1, 1907,* which authorized the City to execute the Agreement of 1907, and which, in Section 3, repealed the Ordinance of 1857 and "all other ordinances" inconsistent with the

* Exhibit P-2.

Agreement of 1907, and by Section Eighth of the agreement of 1907, which provided that

> "The City hereby confirms to the Company and its subsidiary companies ** all of the consents, rights and franchises heretofore granted to, and exercised by them, including the right of operation by the overhead trolley system, free of all terms, conditions and regulations not herein provided for, and does further give up and surrender and agree not to exercise any rights which it may possess in respect to a repeal or resumption of any of the said rights now possessed or heretofore granted, or a taking over of any of said properties, any law, ordinance or contract now in force, or hereafter passed to the contrary notwithstanding: *Provided, however,* That the present rates of fare may be changed from time to time, but only with the consent of the parties hereto: *And Provided further,* That nothing in this contract contained shall be construed to limit the power of the City to make all rules and regulations, relating to the operation and management of the lines controlled by the Company, necessary and proper to be made under the police power."

The point to note, and never to be forgotten when reflecting upon the history of public transit in Philadelphia, is that by Section 3 of the Ordinance of 1907 and Section Eighth of the Agreement of 1907 the underliers' perpetual franchises were put beyond the City's reach. The franchises were already beyond the tenant traction companies' reach, for as has been seen, the underliers held a reversion if their tenants defaulted, and their tenants' rent was at least trebly guaranteed: PRT had to pay the rentals of

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** The fourth recital of the Agreement of 1907 defined "subsidiary companies" to include the underliers and the traction companies that leased the underliers' franchises.

Union Traction; Union had to pay the rentals of the Philadelphia, the Peoples, and the Electric Traction Companies; and Philadelphia, Peoples, and Electric had to pay the rentals of the underliers.* At least, however, before the Agreement of 1907 the underliers' franchises could be bought back by the City; after the Agreement of 1907, they could not be.(*)

The City did get some return for this drastic modification of its position.

Section First of the Agreement of 1907 provided that PRT could not increase its capital stock or funded indebtedness without the City's consent. Section Fourth provided for City representation on PRT's board of directors. Section Fifth provided for examination of PRT's books, accounts, and vouchers by the City Controller. Section Sixth gave the City an equal share with PRT's common stockholders in all net earnings properly distributable as dividend beyond 6 per cent per annum cumulative from January 1, 1907. Section Tenth provided that "in lieu and satisfaction of all obligations on the part of the Company, and its subsidiary Companies, for the paving, repav-

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* The Advisory Committee Report at page 22 cites one case where there were "six successive layers . . . ., each after the first successively bound to pay the guaranteed rentals and perform leasehold obligations for all companies preceding it."

(*) *Cf.* the remarks of Mr. Scott, in opposition to the passage of the Act of April 15, 1907 (Exhibit P-3), which authorized the City to make the Agreement of 1907. He said, in part:

> "The city is to give up its right to purchase, which is the only way that it has to get back its undeterminable and perpetual franchises. The city is to have no right, for the next fifty years to regulate its fares.
>
> "The city is to give up its right to make the traction company remove its wires, and what does it get in return? It gets the right to purchase what the rapid transit company owns, and what the rapid transit company owns is principally made up of leases upon which there are liabilities of enormous capitalization and dividends to be paid." (Pennsylvania Legislature, Record, 1907, Vol. 1, page 1749).

ing and repair of the streets occupied by their surface lines, the obligation to remove[e] . . . snow therefrom, and all license fees with respect to the cars run upon the said streets . . . .," the Company was to pay the City monthly

$500,000 per annum for first 10 years
$550,000 per annum for next 10 years
$600,000 per annum for next 10 years
$650,000 per annum for next 10 years
$700,000 per annum for next 10 years.

But probably the most important right the City got by the Agreement of 1907 was provided by Section Eleventh, as supplemented by Section Ninth. By Section Eleventh

> "The City reserve[d] the right to purchase all the property, leaseholds, and franchises of the Company, subject to all indebtedness . . . upon July 1st, 1957, or upon the first day of any July thereafter by serving six months' notice . . . [for] an amount equal to par for its capital stock then outstanding, to wit: the thirty million (30,000,000) dollars of capital stock now authorized plus any additional capital stock issued with the consent of the City hereunder . . . ."

And Section Ninth provided that there should be a sinking fund, which Section Eleventh provided should "be available to the City" in paying for the Company's assets if the City exercised its reserved right to purchase. The sinking fund was

$120,000 per annum for the first 10 years after July 1, 1912
$180,000 per annum for next 10 years
$240,000 per annum for next 10 years
$300,000 per annum for next 10 years
$360,000 per annum for balance of term of contract.

Thus, it will be noted—and the observation is simply another way of examining the fact that was mentioned above as never to be forgotten in reflecting upon public transit in Philadelphia—that by the Agreement of 1907 the City gave up its right to buy the underliers' franchises in return for the right to buy the assets of PRT, that is, in return for the right to replace PRT as the tip of the pyramid of lessees who guaranteed the underliers' rentals: instead of PRT paying rentals to Union Traction, and so on down to the underliers, the City would pay the rentals.

3. *Events subsequent to the Agreement of 1907, and PRT's failure.*

It is evident from the Agreement of 1907 that the City and PRT hoped, and expected, that the rearrangement of the City's and PRT's positions would stimulate such private investment that the transit system in the City would become so profitable that the pyramid of guaranteed rentals would present no difficulty. Thus, Section First of the Agreement of 1907 provided that PRT should make a call

> "... for the portion of its capital stock unpaid ... payable not later than December 31st, 1908. All of said fund shall be expended for the completion of improvements now undertaken, the providing of new lines, power and equipment, and the general improvement of the transit system."

And for its part, the City, beginning in 1912, began to build, with City funds, certain transit facilities, particularly high speed lines, which it then leased to PRT. In a decision filed on August 2, 1938, on *Application of Philadelphia Rapid Transit Co.*, the Pennsylvania Public Utility Commission described this development as follows: *

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* Just before the passage to be quoted, the Commission summarized the history that has been stated above.

"The inability of Philadelphia Rapid Transit Company to provide adequate and essential rapid transit has been partially overcome by the construction of high-speed lines by the City of Philadelphia. One of these, the Frankford Elevated, completed in 1922 at a cost of more than $15,000,000, is connected physically with the line of the PRT-owned Market Street Elevated Passenger Railway Company and is operated as part of a through route for this line. Another expensive high-speed project built by the City is the Broad Street Subway System, costing to date about $125,000,000. Both of these high-speed facilities are leased by the City to PRT. . . . That the City of Philadelphia recognizes the tremendous importance of adequate local transportation is shown by its philanthropic gesture in building with taxpayers' money the West Market Street Subway which when completed is to be turned over to PRT and its underliers without compensation—principal, interest or rental. The City even contracted to transfer title in this improvement to the Market Street Elevated Passenger Railway so that property, built with taxpayers' money, may be pledged under the mortgages of the Market Street line. About $15,000,000 has been expended by the City to date and many millions more will be needed before the project is completed." (18 Decisions of Pa. P.U.C. 599-600.)*

It is an unhappy fact of Philadelphia history that the efforts of PRT and the City were not successful. This

* And see Advisory Committee Report, page 3, noting that the annual rental for the Frankford elevated, and Bustleton line, "is insufficient by $188,000 to meet the carrying charges on the City's bonds, and those bonds are today [*i.e.*, May 24, 1930] a charge against the City's borrowing capacity." Also see *Commonwealth v. Phila. Rapid T. Co., Aplnt.*, 287 Pa. 70, 72-73 (1926), which tells how the City built the Frankford and Bustleton lines at its expense, and how in 1922 PRT leased and started to operate the lines.

may perhaps best be seen from an examination of the Advisory Committee Report, the 1938 decision of the Public Utility Commission, just quoted, *supra,* and PTC's Exhibit D-37A.

At pages 7-8 and 32-41 of its Report the Advisory Committee gives a "Financial Resume" of PRT.** In this resume the Committee notes the unusual position of PRT in that the assets in its balance sheet do not include either the property of the underliers, which "is not owned by the P.R.T. Co. or any of its subsidiaries," or reflect the "over $115,000,000 [expended by the City as of December 31, 1929] upon rapid transit property . . . as this represents no investment by the P.R.T. Co. . . ."*** According to PRT's consolidated balance sheet, it had a surplus of just over $6,000,000. However, after noting that annual rentals and interest due the underliers were just over $8,900,000,**** the Committee states that

> "The income account of the P.R.T. Co. and its subsidiaries for the year 1929 . . . shows that after payment of operating expenses, the Company had gross income for the year 1929, of $15,236,854. All of this amount except $106,730 was paid out as rentals to Underliers, rental to the City for Frankford elevated, interest, and dividends. No rental was paid during the year 1929, for the use of the Broad Street Subway. It is apparent that from the earnings of 1929 the P.R.T. Co. could not have paid any substantial rental for the Broad Street Subway to the City without either an increase in its revenues or a decrease

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** The Committee explains, at page 33, that it "has made no attempt to audit or even to critically analyze the reported figures" but has accepted "the data submitted by the P.R.T. Co."

*** Advisory Committee Report, pages 33-34.

**** Advisory Committee Report, page 6.

in its operating expenses, fixed charges, or dividends to its stockholders." *

PRT's financial position was described by the Public Utility Commission as follows:

"The grandiose plans for complete monopoly of local transit facilities embraced control of the taxicab companies, purchases of which were begun in 1926 and continued in 1927. The disastrous conclusion of this venture was reached in the latter part of 1935 with the sale by Applicant of the taxicab properties at a heavy loss. Excessive prices paid in purchasing the taxicab companies together with Applicant's financial inability to acquire modern equipment led to failure of this venture. The taxicab episodes are severely condemned in the adjudication of the Court of Common Pleas No. 1 in the City of Philadelphia's suit against PRT under its 1907 Agreement with Applicant (C.P. No. 1, Phila. Co. Sept. Term 1929, No. 2827).

"Applicant has several times acquired and operated intercity and even interstate motorbus companies but these companies have been disposed of. In the optimism of the 1926 era after several successive increases in street railway fare, Applicant even established an interstate airplane service which was continued for several months with the losses eventually falling upon the car-rider.

"The financial history of Philadelphia transit from 1857 until the formation of Union Traction Company indicates that large returns were obtained from the monopoly. The Union Traction did not have the financial success of the earlier companies because of the heavy rental payments it had assumed. Philadel-

* Advisory Committee Report, pages 7-8.

phia Rapid Transit Company had a difficult time until the reorganization of personnel in 1911 brought out the possibilities latent in good management. Some of the benefits of this management were passed on to the stockholders in the form of dividends and more would have been available had not the possibilities of the management been exploited to the limit for the benefit of itself. Several increases in carfare added to the financial possibilities of manipulation by the management. This exploitation was curbed by the institution of an equity suit by the City of Philadelphia against Philadelphia Rapid Transit Company, Mitten Management, Inc., Mitten Bank Securities Corporation, et al., in the Court of Common Pleas No. 1 of Philadelphia County (No. 2827—September Term 1929). The adjudication filed in that case on April 11, 1931, included a decree *nisi* which *inter alia* appointed receivers for Philadelphia Rapid Transit Company. This decree was modified on May 14, 1931, to provide for the election under a five year voting trust, of six directors to the board of directors of Applicant upon the nomination of the Court. In September 1934 the court-appointed directors petitioned the Court of Common Pleas No. 1 for authority to file an original debtor's petition in the United States District Court under Section 77B of the Federal Bankruptcy Act. This petition was granted and the original petition in reorganization was filed in the District Court October 1, 1934; since which time Applicant has been operated under the direction of the District Court." (18 Decisions of Pa. P.U.C. 600-601.)

The accuracy of the Public Utility Commission's remarks is attested by Exhibit D-37A, which is PRT's consolidated balance sheet as of December 31, 1938. This re-

flects a "Corporate Deficit" of $18,899,109.13. Among "Current Liabilities" is included "Matured Interest, Dividends, Rents, etc. due to Leased Companies (without court orders for payment)" of $28,693,295.94. Thus, as the Public Utility Commission observed,

> "The drafters of such leases and contracts outsmarted themselves by their grasping thoroughness. The present reorganization proceedings proved that, within the short space of 32 years,* such leases become [sic] ineffective through inability to meet the terms of 999 leases." (18 Decisions of Pa. P.U.C. 604.)

4. *Proposed solutions of the transit situation.*

It was apparent that there were several possible ways to try to solve the difficulties created by PRT's financial failure. One would be for the City to acquire PRT; but this would require a modification of the Agreement of 1907, which, as has been seen, provided that the City's right to purchase could not be exercised before July 1, 1957; and, a more fundamental problem, it would only have made the City a tenant of the underliers in place of PRT, which if anything would have aggravated matters by making the underliers' franchises even more valuable because backed by the City's credit instead of PRT's. Another approach would be for the City to acquire the underliers. A third approach would be for the City to acquire both PRT and the underliers. This third approach was recommended in the "McChord Report."

C. C. McChord was a former Chairman of the Interstate Commerce Commission when, on January 5, 1927, the Public Service Commission of Pennsylvania "called upon [him] to make a survey and report of the urban transpor-

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* *I.e.*, from the Agreement of 1907 until the Commission's remarks.

tation facilities of the City of Philadelphia . . . ."(**) In his report Mr. McChord recommended that the City acquire the entire transit system by condemning the underliers, as the first step, and by acquiring PRT in 1957, under the Agreement of 1907, as the second step.

Before arriving at his recommendation, it was necessary for Mr. McChord to estimate the value of the underliers' franchises, which in turn required him to decide what would be a fair capitalization figure. Mr. McChord's analysis of the underliers' net return on their rentals appears in Schedule 3 and on pages 21 and 22 of his Report.* It shows that on the basis of the paid-in capital of the underliers, the rate of return from rentals ranged from 4.0% to 73.8%. For the Philadelphia Traction stockholders the rate of return was 8%, and for the stockholders of its underliers the rate was 31.1%, for an average of 11.4%; for the Peoples Traction stockholders the rate was 10.1%, and for its underliers it was 27.7%, for an average of 13.7%; for the Electric Traction stockholders the rate was 7%, and for its underliers it was 37.9%, for an average of 14.9%; and for the Union Traction stockholders the rate was 17.3%, and for its underliers (not including the three traction systems just mentioned), it was 7.1%, for an average of 16.7%.** From this analysis Mr. McChord concluded that a fair capitalization rate would be 7%, and he accordingly estimated the total cost of City condemnation of the underliers at $135,480,633.*** By comparing this amount with the

(**) See page 2 of the McChord Report, submitted to the Public Service Commission on March 17, 1927, and on file with the Clerk of the City Council, and accordingly now judicially noticed.

* It also appears, with some changes, on page 45 of the Advisory Committee Report.

** At page 14 of his Report Mr. McChord characterized this situation as ". . . an accumulation of fixed charges probably never paralleled in the history of street railway exploitation . . . ."

*** McChord Report, page 47.

cost to the City of borrowing the amount as against the savings to the City and the returns that it would receive, he estimated that the condemnation would save the City each year $4,523,138.*

What happened next is best summarized by the Advisory Committee, as follows:

> "After the publication and broad discussion of the McChord Report, the Legislature enacted the Act of May 3, 1927, P.L. 508, known as the Daix Act, which superseded the Hecht Act. It contained two important new provisions, viz., a provision authorizing condemnation of underliers without P.R.T. and a provision authorizing condemnation subject to any or all existing indebtedness. Thereafter, on May 17, 1928, the City passed an ordinance directing an application to be made to the Public Service Commission, petitioning the Commission to fix the price to be paid for underlier condemnation pursuant to the Daix Act. Such a petition was filed on May 25, 1928, and after hearings and investigation, the Commission on September 18, 1928, handed down its report, fixing the price of all underliers, subject to a $10,000,000 mortgage to be left outstanding on the Market Street subway-elevated line, at $138,376,907.16 or a total price of $148,376,907.16.
>
> "On December 18, 1928, the City filed a petition in the Court of Common Pleas No. 4, for a declaration by the Court that the properties of the underliers, proposed so to be acquired, could reasonably be expected to yield net earnings sufficient to meet the carrying charges on the indebtedness to be incurred for that purpose. The City Controller refused to attest this petition and the Court held that he could not be compelled

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* McChord Report, pages 48-49.

by mandamus to do so. On October 1, 1929, the City passed an ordinance abandoning the proceedings looking to underlier condemnation upon the Commission basis.'"*

For a less dispassionate summary, see the letter from the Honorable S. Davis Wilson, Mayor, to City Council, dated September 30, 1937.** Said the Mayor, in part:

"The City of Philadelphia has more than $150,000,000 invested in transit extensions, in subways, in elevated and surface railways, a large portion of which is now part of the City's funded debt. It owns the streets used by the transit company and for many years has sustained great financial loss and its citizens have been burdened by excessive rates of fare and many other inconveniences because of the giving away of the underliers' franchises.

"Millions of dollars have been collected by underlying interests for franchises for which practically nothing was paid and which at the present time represent very little in the way of actual property or assets. Some of these franchises ran as long as 999 years and all attempts to bring about an equitable adjustment, fair to all sides, including the City of Philadelphia, the holders of underlying stock and the car-riders, have failed.

"It is the duty of the City of Philadelphia to correct these evils . . . .

"The transit situation has become a veritable football . . . . and it is imperative at this time that some step be taken to bring about a satisfactory solution . . . .

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* Advisory Committee Report, page 44.

** The letter appears in Volume II, Journal of the City Council; July 3, 1937, to December 19, 1937, Appendix No. 194, pages 353-355.

"....

"....

"....transit has been in and out of the courts, the Public Service Commission and City Council, and although we were successful in showing that the assets of the underliers consisted of 'dead horses' and prevented the taxpayers from being gouged of nearly $150,000,000 for buying their own property, the final settlement of the matter has been delayed through the dilatory tactics used by the underliers."

5. *The reorganization of PRT.*

After the effort to condemn the underliers was absolved, PRT went into receivership, first in equity in the Court of Common Pleas, and then in the District Court under the Federal Bankruptcy Act.*

On December 4, 1934, PRT filed in the District Court a plan of reorganization, dated December 1, 1934, and known as the Original Plan. This plan provided for some $174,000,000 of capital securities. The Public Service Commission filed with the District Court a certificate of public interest, and during 1935, 1936, and 1937, it undertook to determine the original-historical cost of the property to be acquired by the new company that would be formed as a result of the organization proceeding. Meanwhile the Original Plan was superseded by the First Revised Plan, which provided for outstanding capital securities of some $133,000,000. On September 29, 1937, the District Court, Welsh, J., declared the First Revised Plan unworkable because of over-capitalization.(*) On December 6, 1937, PRT filed a

* For this and the ensuing history, see 18 Decisions of Pa. P.U.C. 595-598 (1938).

(*) Judge Welsh remarked in a memorandum opinion ". . . that instead of arriving at something like an actual or adequate value

Second Revised Plan of Reorganization, dated December 1, 1937, providing for capitalization of $100,000,000. The Public Utility Commission started hearings on this early in 1938. During the hearings an amendment of June 1, 1938, to the Second Revised Plan was filed. Testimony on this was concluded before the Public Utility Commission on June 23, 1938, and the ensuing opinion and order appear in 18 Decisions of Pa. P.U.C. from pages 595 through 693.

In its order the Commission disapproved the Second Revised Plan as amended June 1, 1938; and the opinion accompanying the order must be one of the most bitterly and vehemently worded opinions ever handed down by the Commission. At page 602 the Commission observes that

> "Ordinarily the securities distributed to participants in exchange for outstanding securities of merging companies are definitely related to the property for which bonds and stocks are merely evidence of debt or equity interest. The relationship between property and securities is not available to the Commission in this proceeding due to the reluctance and inability of each of the underliers to describe and evaluate that property, if any . . . . Applicant [PRT] seemed reluctant to attempt any determination of property allocation among the underliers although it is in the position of having spent large sums obtained from the issuance of its own securities for improvements, additions, betterments, and replacements of these properties since 1902."

Then, after rejecting a great deal of PRT's suggestions as to the proper value to be assigned to its physical prop-

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of the interests of the participants an arbitrary and apparently unestimated claim of valuation is made and then a proposed plan of reorganization is built around such arbitrary claims." (18 Decisions of Pa. P.U.C. 604.)

erty, the Commission found as follows, at pages 690-691 of its opinion:

> "7. The Commission finds that the fairness of the Plan had not been demonstrated for the following reasons:
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> ". . . .
>
> ". . . .
>
> "c. There is reason to believe that selfish interests are being served to the detriment of PRT employees, stockholders and car-riding-public-stockholders who have, in many instances, contributed not only hardearned savings, but years of willing and painstaking labor . . . . to these people . . . . . the Plan proposes to give practically nothing of value . . . . If the underliers are to secure not only first claim upon, but also essentially all income from, the entire transit system, we believe that the employees and the vitally interested public should know it. Such innocent investors are apparently uninformed of the claims of the underliers to all property purchased with funds derived from the sale of PRT securities. If such claims are pressed and sustained, PRT stockholders would have nothing of value. We do not believe that PRT stock was purchased with the knowledge that the property acquired with such funds would become the property of the underliers. An attempt is being made to continue to pull the wool over the eyes of the public and PRT employees . . . ."

As a result of this opinion and order, the Second Revised Plan of Reorganization was further amended, on November 15, 1938. As thus further amended it is in the record as Exhibit P-8. On November 22, 1938, the Public

Utility Commission, Commissioner Buchanan dissenting, approved the plan, with the following statement:

"The plan presently before us does not entirely meet all the objections raised by us in our previous orders. Nevertheless, it represents substantial concessions: The amount of Consolidated Mortgage Bonds of the proposed company, which are to be issued to holders of securities in underlying companies, has been reduced from $40,710,218.67 to $32,569,997.78. In place of this difference of $8,200,000.00, it is proposed to increase the total par value of new Participating Preferred Stock given this group from $10,305,000 to $12,301,340.00. At the same time the par value of the Participating Preferred Stock has been reduced from $30.00 to $20.00 per share (as compared with $15.00 par value suggested in our order). The stated value of the Common Stock has been reduced from $20.00 to $10.00 per share, which is the figure suggested in our order. Certain fixed obligations such as Divisional Lien Bonds, Real Estate Mortgages, and Ground Rents will remain the same, likewise in accordance with our order. The total amount of securities which it is proposed to issue is thus $85,015,193.42 as compared with $99,986,334.31. As a result of this change in capitalization, the fixed interest charges of the proposed company will be reduced approximately $500,000.

"Several objections to the plan before us still exist. We realize, however, that the debtor must face the practical problem of securing approval of the plan by its security holders. At the same time, the reduction in fixed charges is sufficiently close to the standard suggested by us as to make it unlikely that the new company will in the near future become financially embarrassed and be forced once more to undergo reorgan-

ization. Likewise, the sizeable reduction in funded debt adds to the value of the equity which the holders of common stock of the proposed company will have. All of this new common stock will be distributed to present holders of Philadelphia Rapid Transit Company preferred and common stock. As we pointed out in our previous orders, preferred and common stockholders of Philadelpiha Rapid Transit Company were responsible to a large extent for financing the improvements in the company's system, and we have been anxious that this class of applicant's security holders participate adequately in the ownership of any new company.

"The present application is before us merely by the approval required under Section 77b of the Federal Bankruptcy Act. This report and order should not be construed as requiring the Commission in any proceeding brought before it under the Public Utility Law of the Commonwealth of Pennsylvania for any purpose to fix a valuation which shall be equal to the total of the securities proposed under the applicant's plan, or to approve or prescribe a rate which shall be sufficient to yield a return on said securities: THEREFORE, . . . the proposed plan of reorganization filed by applicant, Philadelphia Rapid Transit Company, and dated December 1, 1937, as amended June 1, 1938, as amended November 15, 1938, be and same is hereby approved." (19 Decisions of Pa. P.U.C. 342-3.)

6. *The events leading up to the Agreement of 1939.*

With the Public Utility Commission's approval of the reorganization of PRT obtained, it remained for the trustees in reorganization to obtain the consent of PRT's shareholders and underliers and of the City. The present litigation cannot be understood, and hence cannot be disposed of

intelligently, without understanding the pulling and hauling that finally did result in getting the consent of these parties. So far as PRT's shareholders and the underliers are concerned, the terms of consent are embodied in the articles of incorporation of the company that emerged from the reorganization, *i.e.*, the Philadelphia Transportation Company.* So far as the City is concerned, the terms of its consent are embodied in the Agreement of 1939.** As has been mentioned, it is this agreement that contains the City's right to purchase PTC's assets, and that is accordingly the storm center of the present litigation.

From the point of view of the trustees in reorganization, the great and essential gain to PTC as the new, reorganized, company would be that it would be freed from what had proved to be the crushing burden on PRT of guaranteed rentals. This objective would be achieved because the underliers and the traction companies would be consolidated and merged with the new company, PTC. Thus, the underliers' perpetual franchises, and the pyramid of leases, with their guaranteed rentals, would become PTC's property.*** So unburdened, hopefully PTC would become a solvent operation.

The underliers and traction companies and their stockholders, however, could not be expected to agree to thus relieving PTC unless their interests were protected, and their efforts to secure the maximum protection, in the form

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* PTC's articles of incorporation appear as part of Exhibit P-8.

** Exhibit P-6; the exact date of the agreement is June 12, 1939.

*** See in particular Article VIII of PTC's Articles: "Each corporation, party hereto [*i.e.*, including the underliers and the traction companies], shall surrender for cancellation . . . and shall release or discharge all leases, agreements, claims, . . . to the end that all property, rights and franchises of each corporation hereto . . . to be included in the merger effected by this agreement shall be and become the property, right and franchises of the corporation [*i.e.*, PTC]". (Page 30 of Exhibit P-8.)

of ensuring that the lion's share of the capitalization of PTC would be issued to them, are reflected in the successive plans of reorganization referred to in the passages from the decision of the Public Utility Commission that have been quoted above.

In the meantime, PRT's stockholders, whose investment in PRT had been wiped out,* reacted unfavorably to the underliers' demands. As has been seen, the Public Utility Commission was sympathetic to the stockholders, especially since the money that the stockholders had paid for their stock had been used to improve property that PRT only leased, and the Commission reduced the proposed capitalization of PTC from $174,000,000 to $85,000,000. It was the stockholders' desire to obtain a fair share of this capitalization, for it would be backed by property that PTC did not merely lease but, because of the consolidation with the underliers and traction companies, owned.

The upshot of these conflicting demands has already been indicated in the passage quoted above from the Public Utility Commission's approval of the reorganization. But before noting the City's interest in the reorganization, it may be well to state it as it was stated in the Second Revised Plan of Reorganization, as amended November 15, 1938.** The underliers' and traction companies' stockholders received, as the price of their consent to the reorganization, consolidated mortgage bonds of some $32,000,000 face value, participating preferred stock of some $12,000,000 par value, and some $2,000,000 in cash. PRT's preferred stockholders waived accumulated dividends but received for each share of PRT preferred stock one half share of PTC participating preferred, one half share of PTC common, and $1.00 cash. PRT's common stockholders received for each share of PRT common one share of PTC common.

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* See Exhibit D-37A.

** Exhibit P-8, page 1 ("The Nature of the Plan").

It is now in order to consider what was the City's price for consenting to the reorganization.

Having obtained the Public Utility Commission's approval of the Second Revised Plan of Reorganization, as amended November 15, 1938, counsel for the trustees in reorganization and for PRT appeared at public hearings before the Committee on Transportation and Public Utilities of the Philadelphia City Council. The proceedings at the second, third, and fourth hearings, which were on April 26, May 1, and May 5, 1939, were transcribed and are on file with the Clerk of City Council.

The form the hearings took was this: It was proposed that the City should consent to the reorganization of PRT by agreeing to an amendment of the Agreement of 1907. This amendment would be an agreement between the City and PTC as the reorganized company. Accordingly, there was presented to the Committee on Transportation a draft of the proposed amendment of the Agreement of 1907, and public hearings regarding the draft were held.

As a result of the hearings, City Council did accept, with certain changes, the proposed amendment to the Agreement of 1907. Its acceptance was by Ordinance of May 20, 1939,* which authorized the execution of the proposed amendment, which when executed became the Agreement of June 12, 1939.** This Agreement of 1939 was then made part of the Articles of Incorporation of PTC.***

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* Exhibit P-7.

** Exhibit P-6.

*** See Articles III and V, which appear as part of the Agreement of Consolidation and Merger, which in turn appears as part of the Second Revised Plan, Exhibit P-8. (". . . 'the contract . . . between the City of Philadelphia and Philadelphia Rapid Transit Company dated July 1, 1907 and amended June 12, 1939 . . . will continue in effect between the City of Philadelphia and the corporation [*i.e.*, PTC] . . . .").

7. The Agreement of 1939, and how it compares with the Agreement of 1907.

The critical provision of the Agreement of 1939, so far as this litigation is concerned, was the provision that amended Section Eleventh of the Agreement of 1907.**** This provision appears in Section 1(d) of the Agreement of 1939, and the extent of the amendment may best be seen by superimposing Section 1(d) of the Agreement of 1939 on Section Eleventh of the Agreement of 1907, as follows:

"Eleventh. The City reserves the right to purchase all the property, leaseholds and franchises of the Company and its wholly-owned subsidiaries* [subject to all indebtedness now existing or hereafter lawfully created]** upon [July 1st, 1957, or upon the first day of July thereafter] any first day of July hereafter, by serving six months' notice on the Company of its intention so to do [,] and upon paying to the Company upon the date named in said notice, an amount equal to [par for its capital stock then outstanding, to wit: thirty million (30,000,000) dollars of capital now au-

**** Other amendments: Section Fourth of the Agreement of 1907 had provided for three City directors (the Mayor and two citizens); by the Agreement of 1939 this was increased to five (the Mayor and four citizens). Section Sixth was amended to change the City's right to participate in dividends. Section Tenth was amended to eliminate the Company's right to a reduction of annual payments for pavement in case streets were abandoned. Also, Section 2 of the Agreement of 1939 extended the lease by the City to PTC of the Broad Street subway and other subway lines, and modified the rentals under the lease; Sections 3, 6, and 7 recognized the reorganization proceedings; by Section 5 PTC agreed to a rehabilitation and modernization program; and Section 4 provided that as amended the Agreement of 1907 and the Broad Street subway lease "shall remain in full force and effect."

* The underlined portions were added to Section Eleventh of the Agreement of 1907 by Section 1(d) of the Agreement of 1939.

** The bracketed portions were eliminated from Section Eleventh of the Agreement of 1907 by Section 1(d) of the Agreement of 1939.

thorized plus any additional capital stock issued with the consent of the City hereunder] the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company. [The fund in the sinking-fund, if not theretofore paid over to the City, shall be available to the City for the purpose of making or assisting in making the said payment for the property of the Company.] The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its wholly-owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: Provided, however, That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised the City shall succeed to and become the owner, [subject as aforesaid,] all of the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly-owned subsidiaries, and the City may either operate the same or lease the right

to operate the same for such terms and upon such conditions as it may deem fit. The right[s] of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserved its franchise to be a corporation with the power to operate passenger [railway] transportation systems and may become a bidder for such right[s]"

Thus, Section 1(d) of the Agreement of 1939 made five major changes in Section Eleventh of the Agreement of 1907:

1. The first, and the most important, change is not evident from the face of the amendment but only from its history, which has been stated above in some detail. When the Agreement of 1907 reserved to the City the right to purchase "all the property, leaseholds and franchises of the Company," it meant, by "the Company," PRT, and it therefore only enabled the City to replace PRT as the underliers' and traction companies' ultimate lessee. But, when the Agreement of 1939 reserved to the City the right to purchase "all the property, leaseholds and franchises of the Company," it meant, by "the Company," not PRT but PTC; and because of the manner in which PRT was reorganized and PTC was created, PTC owned the underliers' and traction companies' leaseholds and franchises; therefore, the City was by the Agreement of 1939 restored to the position that it had enjoyed when the Ordinance of 1857 was in effect, but that it had surrendered by the Agreement of 1907: it could again purchase the entire transit system, not by purchasing the underliers under the Ordinance of 1857, but by purchasing, under the Agreement of 1939, the assets of the new company, PTC, which now owned the underliers' and the traction companies' leaseholds and franchises.

2. The City's reserved right of purchase was changed from a right to purchase PRT's assets "subject to all indebtedness" to a right to purchase PTC's assets free and clear.

3. The time when the City could exercise its reserved right of purchase was accelerated from "July 1st, 1957, or upon the first day of any July thereafter" to "any first day of July hereafter."

4. The price that the City had to pay for the assets that it would acquire by exercising its reserved right of purchase was changed from the par value of PRT's outstanding capital stock to a price made up of four factors: the amount of PTC's outstanding bond mortgages, and ground rents; the par value of PTC's outstanding preferred stock; $10 for each share of PTC's outstanding common stock; and "the amount of . . . .[PTC's] then undistributed corporate surplus, if any."

5. Finally, by the Agreement of 1939 the City reserved "whatever right to condemn it now has or shall hereafter have." There was no such reservation, nor any reference to condemnation, in the Agreement of 1907.

The full significance of these changes will become apparent as the various questions presented by this litigation are considered. But before proceeding to that consideration, one further historical fact, of major importance, must be stated.

When the proposed Agreement of 1939, making the changes in the Agreement of 1907 that have just been enumerated, was submitted to City Council's Committee on Transportation, the Councilmen asked a number of questions. These were often answered by the Assistant City Solicitor, but still more often by Frederic L. Ballard, Esquire, counsel for PRT. Among the questions thus asked and

answered were included the very question now argued to this Court. The hearings before the Committee on Transportation are, therefore, most pertinent in understanding the Agreement of 1939, and they will be judicially noticed by this Court as legislative history.*

Specifically, in considering whether the City should consent to the reorganization of PRT, the Councilmen asked: What would happen to the City's right under the Agreement of 1907 to purchase the assets of PRT? Would the City be able to purchase the assets of PTC as the reorganized company? When could it make such a purchase? What assets would the City get by such a purchase? What would it have to pay? And how would its right to purchase be related to, or affected by, its right of condemnation?

These are not all of the questions presented by the present litigation; but they are most of them; and as to them, the answers are so clearly stated both in the discus-

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* The use of legislative history in the interpretation of statutes and ordinances, and of contracts resulting from them, is an established judicial practice. See *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 41 (1936). The fundamental rule in interpreting contracts is that the Court should construe contracts according to the intention of the contracting parties as gathered from the words of the instrument and the circumstances surrounding the parties at the time the agreement was made. 3 Corbin on Contracts § 539 (1960). The Pennsylvania Statutory Interpretation Act, Act of May 28, 1938, 46 PS 551, provides that "When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters—(1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other laws upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such law." This was so before the Act. See, *e.g., Miles's Estate*, 272 Pa. 329, 339 (1922), and *Orlosky, Appellant v. Haskell*, 304 Pa. 57, 66 (1931). See also *Philadelphia, to Use, Aplnts. v. Phillips*, 179 Pa. Superior Ct. 87, 91 (1955), where the Court states that "The rules of construction applicable to statutes are to be applied with equal force and effect when construing an ordinance." And see McCormick on Evidence § 329 (1954).

sions of the City Councilmen at the public hearings, and in the Agreement of 1939, that there can be no reasonable doubt about what should, and must, be their disposition by this Court.

C. *Is either the Agreement of 1907 or the Agreement of 1939 void because of the rule against perpetuities? (Questions Presented, Question No. 1.)*

1. *What is the period within which the City's reserved right of purchase must be exercised?*

In advancing the argument that the Agreements of 1907 and 1939 are void because of the rule against perpetuities, PTC attacks only the City's reserved right of purchase; it does not question the validity of the other terms of the Agreements.

The period within which the City's reserved right of purchase must be exercised has been stated above, in outlining the history of the Agreements of 1907 and 1939, but for convenience it will be restated. Section Eleventh of the Agreement of 1907 provided that "The City reserves the right to purchase all the property, leaseholds and franchises of [PRT] . . . upon July 1st, 1957, or upon the first day of any July thereafter by serving six months notice. . . . This contract shall continue in force until such right is exercised . . . ." By Section 1(d) of the Agreement of 1939 this was changed to provide that "The City reserves the right to purchase all the property, leaseholds and franchises of [PTC] upon any first day of July hereafter, by serving six months' notice . . . . This contract shall continue in force until such right is exercised . . . ."

The term of the City's right to purchase was, therefore, indefinite. Until the Agreement of 1939 the right could not be exercised before July 1, 1957, but it could be exercised "upon the first day of any July thereafter." By

the Agreement of 1939 this limitation was removed, and the right could thereafter be exercised "upon any first day of July." Both agreements emphasized that there was no time limit upon the exercise of the right to purchase by providing that the right should "continue in force until . . . . exercised . . . ."

Furthermore, Section Ninth of the Agreement of 1907 confirmed that the City's right to purchase was without time limit. By Section Ninth a sinking fund was created, which the City could apply toward the price of PRT's assets if the City exercised its right to purchase. The payments to the fund started on July 1, 1912, and continued for four ten year terms, or until July 1, 1952, in increasing amounts until they were at the rate of $25,000 a month. Then, Section Ninth provided, the payments were to be "finally at the rate of thirty thousand (30,000) dollars monthly for the balance of the term of this contract." No expression different from this could have been used. The draftsmen could not have provided that the $30,000 payments should "continue until July 1, 1957," for although the City could, and hence might, exercise its right to purchase then, it did not have to, and hence might not, for it could exercise the right "upon the first day of any July" after July 1, 1957. Accordingly, the draftsmen were obliged in Section Ninth to use the open-ended expression, "for the balance of the term," *i.e.*, until whenever the City did exercise its right to purchase. When the Agreement of 1939 was executed this indefinite term was confirmed, for Section Ninth was not amended, and Section 3 of the Agreement of 1939 provided that "In all other repsects [*i.e.*, other than as amended by the Agreement of 1939] all the terms and provisions of said contract made July 1, 1907 [i.e.. the Agreement of 1907] . . . shall remain in full force and effect."

In subsequent agreements with PTC the City consistently preserved the term of its right to purchase as indefinite, and it never agreed to any limitation on that term, although, as will appear, PTC asserted, unilaterally, for the first time in July, 1962, that the term was not indefinite.

The first agreement between the City and PTC after the Agreement of 1939 was executed on October 26, 1950.* It amended Section Fifth of the Agreement of 1907, which concerned the power of the City Controller to audit PTC's books; it made no reference to any other provision either of the Agreement of 1907 or of the Agreement of 1939.

The next agreement between the City and PTC was executed as of July 1, 1957.** It was in six sections (A through F), and it did refer to the Agreements of 1907 and 1939.

The third recital of the Agreement of 1957 provided that

> "WHEREAS, there is also in existence an agreement between the parties dated July 1, 1907, as amended by agreements dated December 20, 1932,*** June 12, 1939 and October 26, 1950 (hereinafter called the '1907 Agreement'), which continues in full force and effect subject to the same terms and conditions except as specifically provided herein."

Thus, the City's indefinite right to purchase remained undisturbed, unless "specifically" otherwise provided, and

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* Exhibit P-9.

** Exhibit P-12.

*** Reproduced in Exhibit P-5. This agreement is not pertinent here. It amended Section Ninth of the Agreement of 1907 by capturing the sinking fund that had been created by payments made up to the date of the agreement. Section Ninth had provided that the fund could be captured when it reached $5,000,000, which it had not by 1932. Under the Agreement of 1932 PTC remained liable to continue the payments required by Section Ninth, but it was to make them to the City instead of to a sinking fund.

there was no provision otherwise. In fact, the only provision in the Agreement of 1957 regarding the Agreements of 1907 and 1939, apart from the recital just quoted, was in Section C, which confirmed the City's indefinite right to purchase.

Section C concerned Section Tenth of the Agreement of 1907, as amended by the Agreement of 1939. Section Tenth called for payments to the City by PRT (and later by PTC) for five ten year terms of amounts that started at $500,000 a year and increased to $700,000. The last term specified was for the period July 1, 1947, through June 30, 1957. A dispute arose between the City and PTC about whether the payments should continue, PTC reading Section Tenth as providing that the payments ceased after June 30, 1957, but the City reading it as providing that the payments, once having reached the $700,000 plateau, continued at that rate. Section C of the Agreement of 1957 compromised this dispute by providing as follows:

"C. 1907 AGREEMENT

"8. It is recognized that the 1907 Agreement continues in full force and effect, and the Company will continue to make all payments thereunder including, without limiting the generality of the foregoing, the payments provided for in Section Tenth of the 1907 Agreement (presently approximately Seven Hundred Thousand Dollars ($700,000) annually) for the period of five years commencing July 1, 1957; provided, however, that the continuance of such payments under Section Tenth of such Agreement for said period of five years shall be without prejudice to the position of either party on the question whether the Company is legally obligated, under the terms of said 1907 Agree-

ment, to make such payments subsequent to July 1, 1957, but in no event shall the Company have any claim for repayment of any part of said payments provided for under this Agreement to be paid for the period of five years ending July 1, 1962.

"9. It is understood that the payments received by the City under Section Tenth of the 1907 Agreement for the period subsequent to July 1, 1957 will be used by the City for improvement of City-owned transportation facilities in the sole discretion of the City, but in no event shall the Company have any claim for repayment of any part thereof."

Thus, by the Agreement of 1957 the City and PTC agreed that except for Section Tenth all of the provisions of the Agreement of 1907, as amended by the Agreement of 1939, *i.e.*, including the City's reserved right of purchase, which was exercisable at an indefinite time, continued "in full force and effect."*

The next agreement between the City and PTC was executed as of July 5, 1962.** It is in form an amendment of the Agreement of 1957, being arranged in the same six sections (A through F). In it appears the first assertion by PTC that the Agreement of 1907, as amended by the Agreement of 1939, *i.e.*, the City's reserved right of purchase, was not indefinite in term but had an expiration date.

Section C, paragraph 9, of the Agreement of 1962 represents a further compromise of the parties' dispute regard-

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* *Phila., Aplnt. v. Phila. Trans. Co.*, 404 Pa. 282 (1961), is not to the contrary. There the Court did not, nor was it called upon, to construe the Agreement of 1907, as amended. It held that since the City had not exercised its right to purchase, declaratory judgment would not lie. Hence the Court never reached the construction of the agreements.

** Exhibit P-15.

ing the duration of PTC's obligation to make payments to the City under Section Tenth of the Agreement of 1907, as amended. This time PTC agreed to "continue to make the payments" but at the rate of $50,000 instead of $700,000 a year, and only until December 31, 1964, and "without prejudice to the position of either party on the question of whether the Company is legally obligated" to make the payments. In consideration of this reduction in the amount of the payments, the Company by paragraph 10 of Section C agreed to make certain improvements in its transit facilities and services. Paragraph 11 of Section C then provided:

> "Except as may be specifically provided for herein, each and every of the terms and conditions of the 1907 Agreement, as amended by the Agreement of July 1, 1957, [in the first recital the '1907 Agreement' is defined as the Agreement of 1907 as amended by the Agreement of 1939 and by all the other amending agreements up to the Agreement of 1957], shall remain in full force and effect. This provision is without prejudice, however, to the claim of the Company that under this Agreement the 1907 Agreement terminates on December 31, 1964."

This is the first appearance of any claim that the City's reserved right of purchase was not indefinite in term but had an expiration date. It is to be observed that the City did not agree to the assertion, and thus preserved its right of purchase unchanged and as provided by the Agreements of 1907 and 1939. PTC's unilateral assertion that the City's right nevertheless expired on December 31, 1964, was without foundation. As has been seen, the Agreements of 1907 and 1939 provided beyond question that the City's right could be exercised upon any July 1st of any year, and in the Agreement of 1957 PTC had recognized that this was

so.* PTC's attempt to claim, in the Agreement of 1962, that the City's right had an expiration date can only be regarded as an attempt to create from thin air a claim that might be useful in later negotiations with the City.

The last agreement between the City and PTC was executed as of February 25, 1965, effective January 1, 1965.** Section 2 of this Agreement provided that

> "It is recognized that the 1907 Agreement, as heretofore amended, continues in full force and effect, and the Company will continue to make all payments thereunder including, without limiting the generality of the foregoing, the payments provided for in Section Tenth of the 1907 Agreements, as amended, at the annual rate of Five Hundred Sixty Thousand ($560,000) Dollars for the next six (6) months . . . ."

And Section 3 provided that

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* PTC also recognized in its annual reports to stockholders that the City could exercise its reserved right of purchase on any July 1st. In its Annual Report for 1957 it said in footnote 6: "The City . . . may exercise . . . its right to purchase all the property . . . of the Company . . . upon July 1 of any year . . . ." (Exhibit P-27, exhibit M). PTC said the same in its Annual Report for 1958 (Exhibit P-27, exhibit N), and 1959 (Exhibit P-27, exhibit O), and 1960 (Exhibit P-27, exhibit P), and 1961 (Exhibit P-27, exhibit Q). It even said the same thing in its Annual Reports for 1962, 1963, and 1964 (Exhibit P-27, exhibits R, S, and T). The Annual Reports for 1962 and 1963 did refer to the Agreement of 1962 but only with reference to the Broad Street subway, the Frankford Elevated system, and the reduction of payments. There was no claim in these reports, nor was there in the report for 1964, that the Agreement of 1962 affected the City's reserved right of purchase. The first time that this claim was made in any annual report was in 1965, when footnote 5 said, "It is the position of the Company, not acquiesced in by the City or SEPTA . . . that the Agreement of July 1, 1907, as amended, has expired and that the provisions outlined in the preceding two paragraphs [*i.e.*, the City's right to purchase, and its right to participate in management] are no longer in effect."

** Exhibit P-18.

> "Except as may be specifically provided for herein, each and every of the terms and conditions of the 1907 Agreement, as amended by the 1957 Agreement and 1962 Agreement, shall remain in full force and effect. This provision is without prejudice, however, to the claim of the Company that, under this Agreement, the 1907 Agreement terminates on June 30, 1965."

Thus, in the Agreement of 1965 PTC reiterated its unilateral and unwarranted assertion that the City's reserved right of purchase had expired on December 31, 1964, only modifying the assertion to change the "expiration" from December 31, 1964, to June 30, 1965. For its part, the City preserved its right of purchase unchanged and as it was in fact: a right exercisable upon any July 1st of any year.*

Therefore: under the Agreement of 1907, as amended by the Agreement of 1939, the City had the right to purchase PTC's assets upon any first day of July after 1939. With the term of the City's right thus defined, PTC's claim that the right in invalid because of the rule against perpetuities may be examined.

2. *Herewith PTC's best case.*

The best way to state PTC's argument is to state its best case.

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* Not only did the City preserve its right of purchase unchanged by being careful, in the Agreements of 1962 and 1965, to reject PTC's claim, and to limit that claim as one that PTC alone asserted, but the City also was careful to state its position to the public. Thus, during the negotiations that led to the Agreement of 1965 it was reported that the City Solicitor said that "The city contends that the option continues indefinitely, independent from the periodic renewals of the operating agreement" (Intervenors' Exhibit I-12); and immediately after the Agreement of 1965 was executed, it was reported that the City Solicitor said that "the city retains the right to exercise the option 'as long as PTC is exercising its franchises.'" (Intervenors' Exhibit I-1).

In *Barton v. Thaw, Appellant,* 246 Pa. 348 (1914), plaintiffs were children of Joseph Barton, who had conveyed coal under certain land to Thaw's predecessors in title, by a deed that provided that

> "And in case the said parties of the second part, their heirs or assigns, should at any future time whatsoever desire to purchase any of said land in fee simple, then the said parties of the first part, for themselves, their heirs or assigns, hereby covenant and agree to sell and convey the same to the said parties of the second part, their heirs or assigns, at a price not exceeding one hundred dollars per acre." (246 Pa. at 350).

The sale of the coal was admittedly good, but plaintiffs claimed, by a bill to remove a cloud upon title, that the option to purchase the surface of the land was void because in violation of the rule against perpetuities. "It [was] conceded by counsel that the case presents for the first time to the courts of Pennsylvania the question whether an option or right to purchase land, unlimited in point of time, violates the rule against perpetuities, and therefore is void . . . " (246 Pa. 350-351). The lower Court in a careful opinion held that the option did violate the rule, and the Supreme Court affirmed.

PTC's argument is that the City's reserved right of purchase is also an option "unlimited in point of time," and therefore it is also void. It has been seen, above, that indeed the City's right of purchase is thus unlimited. Is it, however, therefore void?

3. *The nature and consequences of PTC's argument appraised.*

No matter how PTC states its argument, the statement amounts to a repudiation of a promise made so solemnly,

and repeated so often, and relied upon by so many and to such an extent, that the repudiation is almost breathtaking in its audacity. This does not mean that this Court may not be bound to accept PTC's argument, and permit the repudiation. But no Court should accept an argument, blind to its nature and consequences.

The facts pertinent to appraising the nature and consequences of PTC's argument have been stated above, in outlining the history of transit in Philadelphia; they need only be summarized here.

When PTC's predecessor, PRT, promised in 1907 that in 1957 it would sell its assets to the City, the circumstances were that PRT was financially crippled because of the underliers' guaranteed rentals, and the transit system in the City was disorganized. Before the Agreement of 1907 was made, a draft of it, providing for the City's right to purchase, was read to the Legislature, which then passed the Act enabling the City to make the Agreement of 1907. Thus PRT was saved by an agreement that PTC as PRT's successor now asserts was void because of the rule against perpetuities, although no one at the time suggested to the Legislature or the City that the agreement was void. Having benefitted from the Agreement of 1907, the Company now repudiates it.

Great reliance was placed upon this (unknown void) Agreement of 1907, particularly by the City, which, in return for it, surrendered its rights under the Ordinance of 1857 to purchase the underliers' franchises, and which, after the agreement, spent over $150,000,000 to build high-speed lines, some of which it leased to PRT at less than cost. As the Agreement of 1907 recited, it was contemplated that this expansion would be made possible by the agreement. Although it may be of no concern to PTC that the City thus committed millions of dollars of taxpayers' money in reli-

ance upon the validity of the Agreement of 1907, it is of concern to this Court.

During the 1930's PRT went into receivership and was reorganized as PTC. In order to achieve the reorganization PTC made the Agreement of 1939. One might suppose that a company whose very existence is owed to a particular agreement might hesitate to say that the agreement was void. PTC does say that it is only repudiating so much of the Agreement of 1939 as gave the City the right to purchase PTC's assets on any July 1st, but this is sophistry. The City's right to purchase is not severable from the other provisions of the Agreement of 1939; it was the fulcrum of the entire agreement, the provision without which the City would not have consented to the reorganization of PRT and the creation of PTC. There can be no doubt that this is so. As was discussed in detail in stating the history of the Agreement of 1939, what the City achieved by the Agreement of 1939 and the reorganization was to regain the right that it had had under the Ordinance of 1857, but had surrendered under the Agreement of 1907, to purchase the underliers' franchises and hence once again be able to control its streets.

When PRT asked City Council to consent to the reorganization, and to enter into the Agreement of 1939, these matters were discussed. At the second public meetings of the Committee on Transportation and Public Utilities of City Council, on April 26, 1939, one of the Councilmen, Clarence Crossan, and Frederic L. Ballard, Esquire, counsel for PRT, engaged in the following exchange:

> "MR. CROSSAN: Isn't the important point that, so far as we are concerned . . . once the reorganization plan is through, ownership of all of the assets of the consolidated company is in that company, and we never more have the question as to where that lies?

"MR. BALLARD: Yes, that is right.

"MR. CROSSAN: In other words, when we try out that right of recapture, we know that if we do, we take over everything which you physically or otherwise possess.

"MR. BALLARD: Yes, as distinguished from an option of very doubtful value under the 1907 contract."

And later during the hearing:

"MR. BALLARD: . . . . Heretofore this sort of bum option that you had you could only exercise in 1957. Now under our proposal this much better option we propose, that you shall have the right to exercise it on July 1st of any year, not July 1st, 1957 or any year thereafter.

". . . .

". . . . there is only one conclusion possible under our proposal, and that is that you are not only protected but you are getting a lot better right."

One will look in vain in the transcript of the proceedings of the Committee on Transportation for any suggestions by Mr. Ballard, or any one else, that "this much better option" that the City was persuaded to accept and that it and SEPTA now rely upon was an illusion because void as a perpetuity.

Nor is this the only occasion when PRT or PTC failed to suggest a perpetuity. It did not when it asked the Public Utility Commission to approve the reorganization;* nor when it asked the District Court to approve the reorganization; nor when it appeared before the Supreme Court in *Brode, Appellant v. Philadelphia,* 230 Pa. 434 (1911) (when the Court upheld the Agreement of 1907, with the statement,

* Not only Mr. Ballard but George Wharton Pepper, Esquire, represented PRT before the Commission.

at 456, that if the City "should ultimately, in 1957, conclude to avail itself of the right given it under the contract to acquire all the property, leaseholds and franchises of the company . . . . its acquisition . . . . would not constitute it a stockholder . . . ."); nor in *Philadelphia v. Phila. T. Co., Aplnt.*, 386 Pa. 231 (1956) (when the Company attacked the City's standing to enjoin payment of dividends, but the Court held, at 239, that the City "certainly does have an interest *in its right under the agreement to exercise its option* . . . ."; the Company did not suggest that the option was a perpetuity).**

It may be concluded with assurance that during all these years, and legal proceedings, and appearances before Courts and public bodies, the perpetuities argument was never advanced because no one, including most eminent members of the Bar, conceived that it had any merit, if indeed any one conceived of it at all. Now, however, PTC has conceived of it, and advances it. Now, PTC asserts, its assets are worth many millions;* and although these assets could never have been acquired without the Agreements of 1907 and 1939, PTC repudiates the agreements as creating a perpetuity. Thus it seeks to hold what the agreements enabled to it secure, and to leave the City in the position of having surrendered valuable rights, and of having spent millions of dollars of taxpayers' money, and yet unable to enforce the critical provisions of the agreements.

Does the law really require such a result? If it does, it does; and the result will be decreed. As has been said in

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** SEPTA and the City argue that the validity of Agreements of 1907 and 1939 is rendered *res adjudicata* by these decisions. They also cite *Philadelphia v. PTC*, C.P. No. 4, March Term, 1964, No. 2529 (in equity), where the City obtained an injunction (copied as Exhibit P-31C) against payment of a dividend, and where PTC could have but did not make any perpetuities argument. However, as will appear, the point need not be decided.

* It offered to prove that they were worth "between $162 million and $171 million" at present values.

the books, ". . . the rule against perpetuities is . . . a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention." *Barton v. Thaw, Appellant, supra,* at 356, evidently quoting, though without acknowledgement, *Gray,* The Rule Against Perpetuities (*cf.* §629, 4th ed. 1942). But before this Court or any Court should find itself thus impelled, in the extraordinary circumstances presented here, it should require authority that is most imperatively in point.

4. *An examination of the authorities.*

Upon examining PTC's insistence that the rule against perpetuities must be applied to the City's reserved right of purchase, heedless of consequence, the first thought that occurs to one is that the rule seems to have gone astray. It belongs in the field of the law of estates. What is it doing here? When Gray, *supra,* described the rule as "a peremptory command . . . to defeat intention," he concluded, "Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then . . . is to be remorselessly applied." But this case is not "a will or settlement." It is a complex, City-wide, commercial transaction, involving many different sorts of property, and stated in a contract between a public utility and a governmental body. Must the rule still be "remorselessly applied?" At least Gray's dictum does not say so; and as one examines the authorities, he will find that his initial, wary reaction regarding the applicability of the rule was justified; for neither does any other authority say so. True, as the rule has evolved it has been applied to more than "a will or settlement." But it has never been applied to contracts like the Agreements of 1907 and 1939; and the reason the rule was invented (not by any legislature but by

the Courts), and the manner in which it has been developed, show that it should not be applied to those contracts now.

a) *The history and purpose of the rule against perpetuities.*

The background of the rule is stated in Bregy, Intestate, Wills and Estates Acts of 1947, §4(a) & (b), pages 5256-5258, collecting authorities, as follows:

> "Fortunately, more is known of the origin and purpose of the rule against perpetuities than many rules of law. The standard works such as Simes,[1] Tiffany,[2] Kale[3] and, of course, Gray[4] all have good passages on the history of the rule and there is a particularly good analysis in the 'Introductory Note' to Division IV, Part I, of the *Restatement of Property*.[5] As there explained in detail, the modern common law rule against perpetuities represents the last phase of a legal war which raged for centuries over attempts to create the equivalent of an indestructible estate tail.
>
> ". . . .
>
> "The reaction to this form of 'perpetuity' [an indestructible estate tail] came a couple of centuries later [after the statute De Donis Conditionalis]. Late in the fifteenth century judicial blessing was given to the device of 'barring the entail' by suffering common recovery—a trick by which title to the fee was indirectly transferred to a third person by allowing him to take judgment by default in a collusive suit. Since then, a

1. Future Interest (1936) § 479 et seq.
2. Real Property (3d ed. 1939) § 391 et seq.
3. Future Interests (2d ed. 1920) § 113 et seq.
4. Rule Against Perpetuities (4th ed. 1942) § 123 et seq.
5. (1944) Vol. 4, p. 2123 et seq.

tenant of entailed property has had the power to convey a fee.[7]

"The left wing having succeeded in finding a device to circumvent the statute De Donis, the forces of the right now began to circumvent the circumvention. New attempts were made to create an indestructible estate which would necessarily pass down a family from generation to generation—notably by attempts to create indestructible executory interests to arise in the future. But, as Gray puts it, the courts 'having been warned by the history of estates tail, . . . timely took the matter in hand . . .' Forfeiture provisions were held invalid and unvested future estates were held destructible by the first taker . . . .

"It was against this background that the common law rule against perpetuities was developed. It would be less misleading if the rule were described in the affirmative—a rule permitting the creation of unvested future estates which the first taker could not destroy, provided that the estate did not remain unvested for too long a time. This is what was finally settled in 1685 by the famous *Duke of Norfolk's Case.*[8] . . . . [where] it was decided that vesting could remain suspended at least [during a life in being] . . . . Later the period was extended to twenty-one years after the death of a life in being, and this became the common law rule against perpetuities . . . ."

Because of this origin, the controlling question in deciding whether to apply the rule to a future interest outside the field of family estate is, "Will application of the rule serve the purpose for which the rule was invented?"

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7. [Here Brégy refers to a discussion elsewhere in his book on the history of the estate tail.]

8. 3 Ch. Cas. 1682, 1685).

One notable illustration of how this question has led to the conclusion that a future interest should not be stricken down by the rule is furnished by the case of options to purchase in leases. In his famous article, "Perpetuities in a Nutshell," 51 Harv. L.R. 638, 661 (1938), Professor Leach puts it this way:

> "In England it was held that an option to purchase by a lessee stood on the same footing as an option to purchase in gross: it was void if it could be exercised beyond the period of perpetuities. Thus an option to purchase at any time during a lease for 30 years failed. It was not observed that the situation was the exact opposite of that which exists where there is an option in gross. The improvement of the land is stimulated, not retarded, by the existence of an option in the lessee. If the lessee has an option to purchase he can safely improve; for, by the exercise of the option, he can preserve to himself the benefit of the improvement. If he has no option he cannot economically make an improvement which will still have a substantial value at the termination of the lease. Thus, a rule which invalidates options in lessees for the full term of their leases defeats the policy favoring free alienation and full use of property which the Rule against Perpetuities was designed to further. Several American jurisdictions have recognized this fact and have held valid such options; but the English cases still have some following in the United States."

Although there is no Pennsylvania decision that has quite decided the question, it seems clear that when the question is presented, the Pennsylvania Courts will decide that an option to purchase in a lease is not within the rule against perpetuities. The Restatement of Property, §395, does not apply the rule to options in a lease; and in *Poland*

Coal Co. v. Hillman Coal & Coke Co., 357 Pa. 535, 540 (1947), the Court quoted §395 of the Restatement with approval, although the Court did not have to decide the point, since the lease was for 20 years and the Court construed the option as being limited to the term of the lease.

PTC argues that cases such as the *Poland Coal* case are not pertinent, for here the option is not part of a lease but an "option to purchase in gross," which, as Leach notes, has been held void in England, and, by *Barton v. Thaw, supra,* in Pennsylvania. The point, however, is that the Courts have distinguished the option to purchase in a lease from the option to purchase in gross because one does not fetter property, but the other does. Bregy puts the point in this way, at page 5308 of his treatise on the Estates Act, *supra:*

> "These exceptions [such as options to purchase in a lease] indicate that the doctrine of *Barton v. Thaw* cannot be regarded as a blanket condemnation of all remote options. Properly stated the rule should be that an option which remains outstanding after the permissible period is void as a perpetuity unless there is no potential fettering of property or unless such fettering is outweighed by other considerations of policy."

PTC argues that this statement by Bregy is not a statement of what the law is but of what it should be. However, apart from the fact that this argument seems to misread Bregy, the fact remains that what PTC's perpetuities argument comes down to is that *Barton v. Thaw* is to be "regarded as a blanket condemnation of all remote options," and this is not the law, and it should not be.

That this is so best appears from *Barton v. Thaw* itself, where the lower Court, in language approved by the Supreme Court, said, at page 364 of 246 Pa.:

"Such an impress on land [as an option to purchase unlimited in time] ought not to be sustained, and it cannot be. It isolates the property. It takes it out of commerce. It removed it from the market. It halts improvements. It prevents the land from answering to the needs of growing communities. No homes can be built or towns laid out on land so encumbered, because the land always remains subject to be taken under the option. It is not a matter which affects the rights of individuals only. The entire community is interested. The welfare of the public is at stake. It is contrary to the well settled public policy of the state that such an option or right to purchase land should be held to be good. It was for the express purpose of destroying such serious hindrances to material and social property and progress that the rule against perpetuities was brought forth."

Thus the Court in *Barton v. Thaw* did not utter a blanket condemnation of all remote options; it condemned one particular option, for specific reasons that it fully and vigorously stated. Here, as will next appear, not a single one of these reasons is applicable; accordingly, neither is the rule against perpetuities applicable.

b) *The City's option is not "an impress on land" within the rule against perpetuities but a contract right not within the rule.*

In *Barton v. Thaw* the action was to remove a cloud from the title of a particular tract of land in Fayette County. But here, none of PTC's specific assets, real or personal, is charged with the option. Both PTC's President and its Comptroller testified that PTC has often sold particular pieces of land, as well as personalty such as buses and other equipment, without regard to the City's option to

purchase. Moreover, the Supreme Court has established that until exercised the City's option applied to no specific land or thing. In *Philadelphia v. Phila. T. C., Aplnt., supra,* Mr. Chief Justice Horace Stern for the majority said that

> "The Company contends that the City, as optionee, has no legal or equitable interest in the Company's *property as such,* but it certainly does have an interest *in its right under the agreement to exercise its option* according to the terms and at the price therein provided . . . ." (368 Pa. at 239).

And Mr. Justice (later Chief Justice) Bell, although disagreeing with the majority's decision that the City had standing, agreed; and indeed emphasized, that the City had no interest in any specific asset of PTC. He said:

> "Prior to any exercise of the option by the City, *the optionee has no interest, legal or equitable,* in or to the property subject to the option . . . . [citing many cases]" (386 Pa. at 245); and also:
>
> "It is, I believe, clear that the City's *unexercised option of purchase* gives the City no interest in the Company's properties . . . ." (386 Pa, at 247).

Accordingly, the City's reserved right of purchase is not such "an impress on land" as was struck down in *Barton v. Thaw.* It is rather an exclusively contractual right.

As to such a right the Restatement of Property, §401, states that

> "A transaction which is exclusively contractual is not subject to the rule against perpetuities."

The Restatement goes on to say, in Comments a and b:

> "a. *Rationale.* The rule against perpetuities has as it sole objective the prevention of 'inconvenient fet-

terings of property' . . . . When a transaction is 'exclusively contractual' . . . . it involves no fettering of any property and hence there is no occasion for applying the rule . . . .

"b. . . . . A transaction is 'exclusively contractual' . . . . when, and only when, it concerns no specific land or thing other than land . . . ."

which is the case here.

This is also the view of the Supreme Court. In *Caplan, Appellant v. Pittsburgh,* 375 Pa. 268 (1953), the City sold land by a deed in which the grantee covenanted that

". . . if, at any time in the future, the City of Pittsburgh by proper action condemns for street widening purposes for public use the following part of the above described real estate, no claim for damages will be filed or expected by the above grantor or his successors in title." (375 Pa. at 270).

Plaintiff argued that

". . . the covenant created *an interest in land,* which was not then vested, but which was to commence 'at any time in the future' when the city might condemn . . . and . . . thus [was] . . . void as a violation of the rule against perpetuities." (375 Pa. at 271).

The Court had no difficulty in rejecting this argument. It said:

"But as pointed out by Gray . . . . 'The Rule against Perpetuities concerns rights of property only, and *does not affect the making of contracts* which do not create rights of property. Thus a promise . . . on a future event is good, although such event may not happen within twenty-one years after lives in being, ...' (Italics supplied)." (375 Pa. at 271).

c) *The City's option did not fetter but freed property.*

In *Barton v. Thaw* the Court made it plain that basic to its decision was that there the option

> ". . . isolates the property. It takes it out of commerce. It removed it from the market. It prevents the land from answering to the needs of growing communities." (246 Pa. at 364).

Just the opposite is true here.

The pertinent facts that show how the City's reserved right of purchase freed rather than fettered property have been stated in some detail in outlining the history of the Agreements of 1907 and 1939, and they need only be summarized here.

Before the Agreement of 1907, any "passenger railroad company" that wished to use the City's streets had to file, under the Ordinance of 1857, "a detailed statement . . . certified under oath . . . of the entire cost" of the passenger railroad, and the City "reserve[d] the right at any time to purchase the same, by paying the original cost of said road or roads, and cars at a fair valuation." There can be no question that the City's right might be considered as inhibiting the improvement and alienability of the passenger railroad companies' properties (which is not to say that the City did not have the power to reserve the right; this will be considered later). By the Agreement of 1907 the City exchanged its right to purchase under the Ordinance of 1857 for a right to purchase that instead of being exercisable "at any time" could not be exercised until July 1, 1957, and then only by paying par value for PRT's capital stock. The transit situation at the time, and the recitals of the Agreement of 1907 itself, demonstrate that the reason for this arrangement was to stimulate investment on a large scale. This is shown throughout the entire Agreement

of 1907, but it is particularly clear from the sixth recital, which reads:

> "And Whereas, a large sum of money is required to improve, complete and extend the present system of the Company in order that it shall better serve the public; and for this purpose it is essential that the position of the Company be clearly defined, and the securities of itself and its underlying properties unquestioned, and its right to make extensions in the future assured, in order that it may obtain credit to finance the increased transit facilities so necessary for the welfare of the public and the development of the City;".

When the Agreement of 1939 was made, the City's reserved right of purchase was amended so that it could be exercised on any July 1 after 1939; and if the City did exercise its right, it had to pay not only the par value of PTC's capital stock, but "the face amount . . . and accrued interest of all then outstanding prior lien bonds, mortgages and ground rents," and "the amount of the then undistributed corporate surplus." This, too, like the Agreement of 1907, not only did not fetter but freed property. The transit system was in receivership. The Agreement of 1939 saved it, and by protecting PTC's shareholders and creditors, permitted it to expand by making investments that since 1940 run into many millions of dollars.

d) *The City's option is not contrary to but in furtherance of public policy.*

In *Barton v. Thaw* the Court said, at 364:

> "It [the option] prevents the land from answering to the needs of growing communities . . . . It is not a matter which affects the rights of individuals only.

> The entire community is interested. The welfare of the public is at stake. It is contrary to the well settled public policy of the state . . . ."

But the City's reserved right of purchase is just the opposite. It was devised precisely in order to answer the needs of a growing community (Philadelphia), and it was not only in accord with well settled public policy, but was provided for pursuant to express statements of that policy, both by the State Legislature and the City Council.

The manner in which the City's reserved right of purchase was devised to answer the needs of a growing community has just been discussed above, and the discussion need not be expanded except to add a reference to the last recital of the Agreement of 1907, which stated, in part, ". . . it is further desirable that provision should be made for the sharing by the City in the earnings of the Company from further growth of the City . . . ." It is beyond dispute that the principal purpose, both of the Agreement of 1907 and of the Agreement of 1939 (each of which depended upon the City having a reserved right of purchase, as has been discussed), was to provide a growing community with a transit system that the community needed but without the agreements would not have. It remains, however, to refer to the specific statements of this public policy apart from the agreements themselves.

The first expression that it was in the public interest for the City to have the right to purchase the transit system was by the Ordinance of 1857, by which, as has been seen, the City required the passenger railroad companies to consent to the City's right to purchase their facilities. The ordinance went on to provide that "any such Company or Companies, refusing to consent to such purchase, shall thereby forfeit all privileges, rights and immunities they

may have acquired in the use or possession of any of the [City's] highways . . . ."*

In 1874 the new Pennsylvania Constitution was adopted. Article 17, §9, provided that

> "No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities."

Thus, the City's power to reserve its right to purchase the transit system was constitutionally recognized and secured.

The extent of the City's constitutional right was soon stated. In *Allegheny City v. Railway, Appellant,* 159 Pa. 411 (1893), a street railway company refused to accept an ordinance that, like Philadelphia's Ordinance of 1857, provided that the company must accept it, and that "a failure to comply with its provisions shall work a revocation of [the company's] privileges by said ordinance granted." (159 Pa. at 412). In upholding the City's right to impose such a provision, the Court said:

> "The provision of the constitution is peremptory and unlimited. It is part of the pervading intent of that instrument to give local bodies the control of local affairs. The public history of the time, of which the court may take judicial notice, shows that one of the prime objects of the people in calling a constitutional convention was to do away with special legislation which interfered with local affairs . . . . the provision . . . is . . . without expressed limitations of any kind. It is a gift directly from the constitution to the local bodies, and needs no help, nor permits any interference from the legislature. If any limitations are to be implied by the courts, the implication must arise from clear

* Exhibit P-4, Section 8, also referred to in the discussion, above, on the origin of the Agreements of 1907 and 1939.

necessity, as absolute, as peremptory and as unavoidable as the constitutional mandate itself. The burden therefore is on the party affirming that the exercise of the local authority is not valid." (159 Pa. at 415).

"The power of the municipal authority to give or refuse consent is unlimited and unqualified. That necessarily implies the power to impose reasonable conditions in giving their consent. *If they impose unreasonable conditions all the company can do is to refuse to accept.*" (159 Pa. at 418).*

It was not long after this statement by the Supreme Court that the Legislature made it plain that it did not think that it was an unreasonable condition for the City to insist upon reserving a right to purchase the transit system, upon terms unlimited by the rule against perpetuities.

By the Act of April 15, 1907,(*) the Legislature empowered

". . . any city, borough or township, of the one part, and any street passenger railway company, surface, elevated or underground, or motor power company . . . of the other part . . . to enter into contracts with each other [which] . . . may provide for the ultimate acquisition by the local authorities, upon terms mutually satisfactory, of the leaseholds, property and franchises of the contracting companies."

Before it approved this Act, the Legislature had read to it a draft of the agreement that became the Agreement of 1907, including a provision

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* For a later statement in accord, see *Phila. Electric Co. v. Phila., Appellant*, 301 Pa. 291, 298, 300 (1930) ("the contractual conditions imposed by the city, which plaintiff could either accept or reject, were impositions certainly within the scope of its municipal powers"; "the conditions exacted, and which plaintiff accepted, were such as the city deemed proper [citing the *Allegheny City* case]").

(*) Exhibit P-3.

"That the City of Philadelphia shall have the right at any time after December thirty one, one thousand nine hundred and fifty six,** to purchase all the leases, franchises and property of the transit company . . . ."***

The remaining statements of public policy to be mentioned are those by City Council. These are the Ordinances of July 1, 1907,(*) and of May 20, 1939.(**) The first authorized the Mayor to execute upon behalf of the City the Agreement of 1907, and the second gave the City's consent to the reorganization of PRT as PTC and authorized the Mayor to execute upon behalf of the City the Agreement of 1939.

In view of these pronouncements in the Constitution, by the Supreme Court, the Legislature, and City Council, SEPTA and the City contend that the rule against perpetuities is inapplicable as a matter of law, *i.e.*, that so far as the Agreements of 1907 and 1939 are concerned, the rule against perpetuities as a rule of common law must yield to applicable legislation. There is great force to this argument. It is difficult to imagine language more broad and unequivocal than that of the *Allegheny City* case, *supra, or* legislation more specifically in point than the Act of April 15, 1907, *supra*. Professor Leach has said,(***) in speaking of a California case involving a lease between the City of Oakland and a contractor,

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** In the final draft of the Agreement of 1907 this became, as has been seen, July 1, 1957.

*** Pennsylvania Legislature, Record, 1907, Vol. 1, page 1749.

(*) Exhibit P-2.

(**) Exhibit P-7.

(***) In Leach, "Perpetuities: New Absurdity, Judicial and Statutory Correctives", 73 Harv. L. R. 1318 (1960), at 1321.

"Another possible ground for sustaining the Oakland lease**** derives from the fact that a municipality was the lessor. The Rule Against Perpetuities is a device for protecting the public interest against private settlements which unduly tie up the basic resources of the community. But in this case the city *is* the public. It is at least arguable that the Rule should not apply at all to dispositions made by duly constituted public bodies. The judge-made Rule was never conceived as a limitation upon the sovereign, and the California constitution, incorporating the common-law Rule, should not be construed as a limitation on action by the state or any of its subdivisions. The inapplicability of statutes of limitation is a useful analogy [citing 3 American Law of Property §15.13 (Casner ed. 1952)]."*

However, it is not necessary to go so far. In similar circumstances other Courts have needed only to reason by analogy, and the same approach will be adopted here.

The starting point has been stated by the California Supreme Court in the *Wong* case, *supra*, as follows:

**** The Court, to the Professor's dismay, held the lease invalid. *Haggerty v. City of Oakland*, 161 Cal. App. 2d 407, 326 P. 2d 957 (Dist. Ct. App. 1958). The decision has been widely deplored "in terms which range from rebuke to castigation", Leach, *supra*, at 1319, and the Supreme Court of California, in *Wong v. DiGrazia*, 386 P. 2d 817 (1963), citing Leach with approval, 386 P. 2d at 822 and 823, has expressly disapproved it, 386 P. 2d at 826.

* *Cf. Schonthal v. Village of Sylvania*, 21 N.E.2d 1008, 1012 (Ohio Ct. App. 1938) ("Certainly no rule against perpetuities could ever be intended to apply to municipal corporations. On the contrary, they are designed and intended to be perpetual."), and *Meritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2*, 237 F. Supp. 985, 994 (S.D.N.Y. 1965) ("This rule [against perpetuities], however, does not apply to these trusts, because they are classified within the category of trusts for a Governmental or Municipal Purpose. (See Abridgement of the Law of Trusts, Austin Wakeman Scott, 1960, p. 675).").

"Surely the courts do not seek to invalidate bona fide transactions by the imported application of esoteric legalisms. Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected." (386 P. 2d at 823).

A most useful case along this road is *Todd v. Citizens' Gas Co. of Indianapolis,* 46 F. 2d 855 (7th Cir. 1931), *cert. denied,* 283 U. S. 852 (1931), where the Court refused to apply the rule against perpetuities in a situation very similar to the case here. By a statute of 1905 the City had been given the power to regulate gas companies. In accordance with the statute, the City by an ordinance of 1905 approved a contract that granted permission to use the City's streets for gas lines subject to certain conditions, which were required to be stated in the gas company's articles of incorporation. Among the conditions it was provided that the company's stock should be held by five trustees, one of them selected by the Mayor; that the company had to build certain facilities and furnish certain services within a given time; that the City's board of public works could conduct inspections and tests, and make regulations to which the company would be subject; and that the earnings of the company were to be applied in a stated order, which included application to the cost of extensions ordered by the board of public works. A further condition was that when the stockholders had received by dividends or otherwise the face value of their certificates, plus 10 per cent interest, "it shall be the duty of the trustees and directors of the company to convey the gas plant and property belonging to the company to the city . . . and all the right, title, and interest of the company or its certificate holders . . . shall be . . . extinguished . . . ." (46 F. 2d at 858.) This condition was beyond the period permitted by the rule against perpetuities, for the agreement provided that it should be in force

for 25 years (46 F. 2d at 859). In an action in equity attempting to prevent the transfer of the company to the City in accordance with the ordinance and agreement of 1905, the Court was met with the argument that

> "The rights asserted by the city are attacked as void under the rule against perpetuities. An attempt is made, it is charged, to incumber the property of the Citizens' Company for twenty-five years with unvested contingent interests." (46 F. 2d at 866).

The Court had no difficulty in rejecting the argument. It said:

> "The legal title to the property which was acquired with the money contributed by the certificate holders was in the Citizens' Company, subject to the trust in favor of the inhabitants of the city. This, we think, plainly appears from the charter of the company. The conveyance to the city to be made when the charge in favor of certificate holders was released as a continuance of the trust; the city being the successor in the fiduciary relationship. This public charitable trust is not within the rule against perpetuities. The rights arising from the provisions of the company's charter vested in interest upon the organization of the company, and were postponed merely in enjoyment by the charge on the property in favor of the certificate holders.
>
> "But the rule may not be invoked even on appellants' theory that the rights of the city amounted to nothing more than an option to be exercised at any time within twenty-five years. The rule against perpetuities concerns rights of property only, and does not affect the making of contracts which do not create the rights of property. By the great weight of authority, a mere

> option to purchase land does not vest the holder of an option with any interest, legal or equitable, in the land. Richardson v. Hardwick, 106 U.S. 252, 255, 1 S. Ct. 213, 27 L. Ed. 145; Thacher v. Weston, 197 Mass. 143, 147, 83 N.E. 360; Keogh v. Peck, 316 Ill. 318, 147 N.E. 266, 38 A.L.R. 1151, and cases cited in 39 Cyc. 1238, note 19. The rule to be applied to what appellants claim is an option in a franchise contract would be the same as is applied in the case of an option to purchase contained in a lease, and such options are not within the rule against perpetuities. Keogh v. Peck, supra, and cases cited; Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N.E. 177." (46 F. 2d, at 866).

PTC attempts to distinguish this decision by saying that in 1921 the gas company's articles were amended to provide for a transfer to the City in 1930. This, says PTC, meant that the transfer was certain to occur within a period of less than 21 years. But the Court took no such view. It looked only at the original contract, and held it valid. Indeed, the City was acting under the original contract; the persons who sought to prevent the transfer to the City invoked the amendment of 1921, saying that this extinguished the original contract (46 F. 2d at 863).

PTC next asserts that in any case the decision is *contra Barton v. Thaw*, which brings this discussion full circle. The case is not *contra Barton v. Thaw*. *Barton v. Thaw* is unquestionably good law. It is also unquestionably so different from the present case that it is not controlling. And for the reasons that have been stated, to extend it to the present case would permit PTC to repudiate its most solemn agreements, from which it has greatly benefitted, and would do the public, as represented by the City, a great injustice. In Professor Leach's acid phrase, such a result would be an absurdity.

5. *By virtue of the Estates Act of 1947, the rule against perpetuities is in any event inapplicable.*

For completeness of discussion, the current rule against perpetuities, as compared to the common law rule, must be considered.

Assuming that the Agreements of 1907 and 1939 did violate the common law rule against perpetuities, the City's reserved right of purchase is saved by the Estates Act of 1947, Act of April 24, 1947, P.L. 100, 20 PS §301.4.

The Estates Act provides in Section 4(a) and (b), that

> "No interest shall be void as a perpetuity except . . . [u]pon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events . . . ."

Thus, if an option void at common law actually vests within 21 years, it is valid even though it might not have vested that soon. Or, as Bregy puts the point, at page 5307 of his treatise on the Estates Act:

> ". . . such agreements will no longer be void from the beginning as in *Barton v. Thaw.* Under the statute an unlimited option should be allowed to run until the expiration of the permissible period, and stricken down only if it remains unexercised at that time." (footnotes omitted).

If the City and PTC had made no further agreements after the Agreement of 1939, the Estates Act of 1947 would not be pertinent. However, as was seen in discussing the duration of the City's reserved right of purchase, the City and PTC made the Agreements of 1957, 1962, and 1965. The importance of this fact appears when one considers Section 21 of the Estates Act, 20 PS §301.21. This provides that the Estates Act

> ". . . shall take effect on the first day of January, one thousand nine hundred forty-eight, and [except in respects not here material] shall apply only to conveyances effective on or after that day. As to conveyances effective before that day, the existing laws shall remain in full force and effect."

Therefore, if either the Agreements of 1957, 1962, or 1965 was a "conveyance," the "wait and see" doctrine of the Estates Act applies, and not the common law rule against perpetuities.

"Conveyance" is defined by Section 1 of the Estates Act, 20 PS §301.1, as

> ". . . an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation."

It may be that neither the Agreement of 1962 nor the Agreement of 1965 is a "conveyance" within this definition, for, as will be recalled, starting with the Agreement of 1962, PTC unilaterally asserted that the City's reserved right of purchase had expired on July 1, 1957, to be extended by later agreements. The parties' intentions, therefore, were not in accord with respect to the right of purchase.

However, the Agreement of 1957 does qualify as a "conveyance."* There the parties were in accord with respect to the City's reserved right of purchase; PTC had not conceived its perpetuities argument; and by the Agreement of 1957 it agreed with the City that "It is recognized that the 1907 Agreement [which was defined to include the Agreement of 1939] continues in full force and effect . . . ."**

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* As indicated in the statement of the Questions Presented, Question No. 2, PTC at the trial argued that the Agreement of 1957, as well as the Agreements of 1962 and 1965, was void because never approved by the PTC's shareholders. At oral argument, PTC said that it was not making the argument with respect to the Agreement of 1957.

** Exhibit P-12, Section 8.

PTC responds that this amounted only to "recognition" and cannot be considered a "conveyance." The response ignores the words that immediately follow the recognition, which are that

> "and the Company will continue to make all payments thereunder . . . ."

and the section goes on to provide that for five years PTC will pay the City $700,000 a year, the next section then providing that the City will use those payments "for improvement of City-owned transportation facilities." It is not possible to maintain with persuasion that an agreement by one party to pay 5 x $700,000, over 5 years, or $3,500,000, to another party, who promises in return to use the money in a certain way, is not "an act . . . intended to create an interest in . . . personal property," and hence a "conveyance," and hence subject to the wait and see rule and not subject to the common law rule against perpetuities.

Under the wait and see rule, the City's reserved right of purchase vested in time, *i.e.*, within 21 years of July 1, 1957, the effective date of the Agreement of 1957, for the City assigned, and SEPTA exercised, the right on June 8, 1965.*

Nor is such a conclusion novel. Rather, it is in accord with the Supreme Court's application of the Estates Act in an analogous situation. In *Huested Estate*, 403 Pa. 185 (1961), the settlor had created a trust in 1940 that was then valid even though it defrauded his wife, but which was made invalid by the Estates Act of 1947; the settlor then amended the trust several times, including in 1951 and 1956; both the Orphans' Court and the Supreme Court had no difficulty in holding that the amendments were "conveyances," and in permitting the wife, after the settlor's death, to take her

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* Exhibits P-21, P-22, and P-23.

intestate share of the trust assets. Said Mr. Justice (later Chief Justice) Bell for the Court, quoting in part the earlier decision of *Behan Estate,* 399 Pa. 314 (1960):

> " 'The new mischief to be remedied and the reason for the new law are clear. Wives were being very unfairly deprived of a share in their husband's personal property . . . . The legislature . . . by . . . the Estates Act of 1947 remedied this gross injustice . . . .' " (403 Pa. at 191).

This statement is appropriate here. To permit PTC to repudiate the Agreements of 1907 and 1939 by invoking the rule against perpetuities would indeed result in gross injustice.

PTC replies that in the *Huested* case the Court found a "conveyance" because the settlor's amendments completely restated his dispositive scheme. This is true (403 Pa. at 192). But it does not follow that if there had only been an important amendment, as the City's and PTC's Agreement of 1957 was an important amendment of the Agreement of 1907, rather than a complete restatement, the Court would have failed to find a conveyance. One may feel assurance that the Supreme Court would not so easily have been prevented from protecting the widow. As the Court said, "If the language of a remedial act is ambiguous it must be liberally construed . . . ." (403 Pa. at 192).

No more than this is necessary. Neither will this Court be so easily led to conclude that PTC may repudiate its obligations. If the common law rule of perpetuities did apply to the Agreements of 1907 and 1939, the Estates Act of 1947 applies to the Agreement of 1957, and the City's reserved right of purchase is preserved.

D. *Is the City's reserved right of purchase void as unenforceable because it had expired before exercised, or for any other reason? (Questions Presented, Question No. 2.)*

1. *PTC's arguments.*

As was observed, when discussing the rule against perpetuities, PTC, starting with the Agreement of 1962, asserted that the City's reserved right of purchase expired July 1, 1957. From this premise it proceeds to the assertions that the Agreement of 1957 extended the right of purchase until July 1, 1962, which was the effective date of the Agreement of 1962;* that the Agreement of 1962 extended the right of purchase until December 31, 1964, which was the expiration date of the Agreement of 1962; and that after December 31, 1964, the right of purchase would no longer be exercised because its exercise required six months notice, which, in PTC's view, SEPTA never gave. PTC's argument about notice is this: After the Agreement of 1962 came the Agreement of 1965, which was effective January 1, 1965, and expired June 30, 1965. "Six months notice" should be construed to mean notice given six months before the end of the agreement; but SEPTA did not give notice until June 8, 1965, hence too late.

PTC next argues that if its notice argument should be rejected, still SEPTA's notice was ineffective because except for the "extension" of the reserved right of purchase that had been effected by the Agreement of 1965, there would be no right of purchase that SEPTA could give notice of exercising, and, argues PTC, the Agreement of 1965 was

* As has been observed by reference to PTC's annual reports, PTC did not think of this argument until five years after the Agreement of 1957.

invalid because it was never approved by PTC's shareholders.**

It is unnecessary to consider any of these arguments. The premise of all of them is unsound. The City's reserved right of purchase did not expire on July 1, 1957. The right was not modified in any way by the Agreement of 1957, the Agreement of 1962, or the Agreement of 1965. And the right continued in effect until SEPTA exercised it. All of this was seen at the start of the discussion of the rule against perpetuities, when it was necessary to determine whether the City's reserved right of purchase had to be exercised within a definite period.

2. *The intervening minority shareholders' argument.*

The intervening minority shareholders agree with PTC that the City's reserved right of purchase expired December 31, 1964. They disagree, however, about the effect of the Agreement of 1965, or at least they seem to disagree.* As will appear, it is not always clear what is the position of the minority shareholders. They seem to argue that if the Agreement of 1965 was effective, it did extend the right of purchase, and SEPTA did give sufficient notice. However, they argue, the Agreement of 1965 was not effective but must be set aside because it was procured by "fraud, accident or mistake." PTC has refused to argue any fraud, accident, or mistake. It was because of the refusal that the minority shareholders petitioned for leave to intervene.

Logically, the minority shareholders' argument need not be considered. It depends upon the same premises as

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** From the trial it appeared that PTC also claimed that the Agreements of 1957 and 1962 were invalid for lack of approval by the shareholders. At the oral argument, however, this claim was abandoned.

* Counsel for the intervening minority shareholders stated to the Court that he did not consider any of the PTC's arguments to have any merit, and that only his argument could prevent the successful exercise by SEPTA of the reserved right of purchase.

the arguments of PTC that have just been mentioned: that the City's reserved right of purchase expired December 31, 1964, which it did not. Nevertheless, the minority shareholders' argument will be considered for reasons that will now appear.

As was stated in the History of the Case, the minority shareholders not only alleged "fraud, accident or mistake" in their petitions to intervene, but, when this Court dismissed their petitions, they persisted in their allegations by appeal to the Supreme Court. They did not inform the Supreme Court, as they had not informed this Court, what they meant by "fraud, accident or mistake." However, the Supreme Court held that, "because of the very exceptional circumstances in this matter and the tremendous public importance of this litigation," the minority shareholders should be permitted to intervene and "to present testimony and evidence." Under these circumstances, illogical as the minority shareholders' claim may be, it will be considered. Undoubtedly, the reason for the Supreme Court's order was that it wished the record to show whether in a matter of such public importance any one had been guilty of fraud, or accident, or mistake. Accordingly, during the trial the minority shareholders were given almost unlimited scope in presenting their case. With the record complete, it may be seen that their assertions are without merit.

a) *The principles of law pertinent to cases of fraud, accident, or mistake.*

To prove fraud it must be proved (1) that a false representation was made as to a material fact; (2) that the person who made the representation knew or should have known the truth but made the representation knowing that it was false or with a reckless disregard of whether it was true or false; (3) that he intended that the person to whom

the representation was made should act upon it; and (4) that the person did act upon it, and was misled to his injury. *Ackman v. Jaster,* 179 Pa. 463 (1897); *Devers v. Sollenberger,* 25 Pa. Superior Ct. 64, 67-68 (1904). Moreover, where the fraud alleged concerns a written instrument, the rule is that "Nothing short of evidence precise, clear, and indubitable can be allowed to overturn a written instrument," *Laughlin v. McConnel,* 201 Pa. Superior Ct. 180, 183 (1963). "evidence must be of such weight as to make out [the] facts alleged beyond a reasonable doubt . . . ." *Idem,* at 183-184.

It is not apparent what intervenors mean by "accident," or how they consider "accident" differs from "mistake." However, to set aside a contract for mistake, it must be shown that

> ". . . where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into a transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be, except
>
> "(a) Where the welfare of innocent third persons will be unfairly affected, or
>
> "(b) Where the party seeking to avoid the transaction can obtain reformation or performance of the bargain according to the actual intent of the parties when the transaction was entered into, or
>
> "(c) Where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he sup-

statement of Contracts, §502.

Moreover,

> "A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable; nor do such mistakes of both parties if the respective mistakes relate to different matters; but if the mistakes relate to the same matter, the power of avoidance is not precluded because the mistakes of the parties as to that fact are not the same." Restatement of Contracts, §503.

And finally, avoidance of a contract for mistake requires proof of the necessary facts "by clear and convincing evidence and not by a mere preponderance." Restatement of Contracts, §511.

b) *Intervenors' evidence.*

Section 3 of the Agreement of 1965 provided that

> "Except as may be specifically provided for herein, each and every of the terms and conditions of the 1907 Agreement, as amended by the 1957 Agreement and 1962 Agreement, shall remain in full force and effect. This provision is without prejudice, however, to the claim of the Company that, under this Agreement, the 1907 Agreement terminates on June 30, 1965."

As has been discussed, this recognized that the City's reserved right of purchase (as one "of the terms . . . of the 1907 Agreement" remained "in full force and effect;" however, intervenors read it not as recognizing but as extending the reserved right of purchase; and for the present discussion, *arguendo,* their view will be accepted. The question then becomes, "Why was the extension not effective?"

It is to this day difficult to be entirely certain what intervenors' answer to this question is. In general, their answer appears to be that the "extension" effected by the

Agreement of 1965 was not intended to apply to the City's reserved right of purchase, which therefore expired. But whether this state of mind (intention) was caused by mistake, and if so, whose mistake, or whether because someone (unnamed) representing the City deceived someone (also unnamed) representing PTC, intervenors do not say.

At a pre-trial conference, which was held on June 2, 1966, before intervenors presented their case on June 3, intervenors' counsel said, with respect to his demand that the City produce certain documents:

> "Well, Mr. Bullock [who was trying for the City], and, Your Honor, it's very hard to distinguish definitely between fraud and accident and mistake. I feel that I can't undertake to do that. They merge into each other, and I don't think they have any clear line of demarcation. At least, if they do, I haven't been able to find it."

After the trial, intervenors submitted requests for findings of fact and conclusions of law. These are of little more assistance to this Court than intervenors' pre-trial statement. The first requested conclusion of law states, "1. PTC never intended the 1965 agreement (Ex. P-18) to have the effect of extending the purchase-option rights of the City under the 1907 agreement (Ex. P-1) as amended (Ex. I-4)." And the second requested conclusion of law states, "2. Prior to February 17, 1965, no representative of the City had any intent, plan or design to use the 1965 agreement (Ex. P-18) as an extension of the City's purchase-option rights under the 1907 agreement." These requests do suggest that intervenors argue mutual mistake; and the seventh requested finding of fact and the fourth requested conclusion of law do ask that the Agreement of 1965 be declared "invalid on the ground of mistake." However, the sixth requested finding of fact and the third requested conclusion of law

ask that the Agreement of 1965 be declared "invalid on the ground of conspiracy and fraud." As to who were the conspirators and defrauders, there is neither suggestion in intervenors' brief, nor requested finding, nor requested conclusion.

In view of this uncertainty about intervenors' position, there is no alternative except to review the testimony of the witnesses that intervenors called, one by one, and see what fraud or mistake, if any, they proved.

(i) *The testimony of Ernest R. von Starck, Esquire.*

Mr. von Starck was counsel for PTC before present counsel. On direct examination, he testified that as PTC's counsel he attended "several" of "the discussions and negotiations that led up to the execution of the agreement dated February 25, 1965." He was then asked,

> "In any of those discussions or negotiations, did anyone mention or refer to the purchase option rights of the City under the 1907 agreement?"

The question was objected to as violating the parole evidence rule. However, since intervenors were claiming "fraud, accident or mistake," the objection was overruled, and Mr. von Starck replied, "The answer to the question is no." He was then asked,

> "Did you have any intention that the agreement of February 25, 1965, should operate as an extension of the purchase option rights of the City under the 1907 agreement?"

After the same objection and same ruling, Mr. von Starck replied,

> "Well, that involves the expression of a legal opinion which was conveyed to my client at that time, and

> my client at that time now has a right and privilege to object to that question. I want to call that to the attention of counsel for PTC."

Counsel for PTC thereupon stated,

> "I wouldn't waive that privilege on behalf of the Company,"

and that Mr. von Starck "cannot" answer the question. Thereupon, counsel for intervenors stated that he had no further questions.

Mr. von Starck's testimony is of no value to intervenors. It proved nothing as to fraud, nor even suggested any. So far as mistake is concerned, as has been seen, before a contract may be avoided for mistake, the mistake must be mutual: Restatement of Contracts, §502, *supra* (". . . where both [parties are] under a mistake . . ."); and Mr. von Starck's testimony proved nothing regarding the state of mind or intention of the City's representatives. Nor did it prove anything regarding the state of mind of PTC's representatives. The failure of the negotiators to mention the City's reserved right of purchase may have been, so far as anything that Mr. von Starck said is concerned, because the City and PTC negotiated only with respect to other matters, specifically, only with respect to the Broad Street subway lease, intending all along that the City's right of purchase should remain in effect—which is what the Agreement of 1965 said—and only failing to mention the right because to mention it was unnecessary.

On cross-examination Mr. von Starck's testimony not only did not help intervenors but hurt them.

The Agreement of 1965 was not completely executed until February 25, 1965. However, Mr. von Starck said, its terms had been agreed upon before the end of December, 1964; the delay in execution was because a City ordinance

permitting execution was required. Mr. von Starck read into the record a letter of December 15, 1964, from Albert G. Lyons, as President of PTC, to the Mayor, stating, in part,

> "You . . . have the Company's consent to an extension of the Broad Street Subway Lease dated June 28, 1934 (as amended in 1939, 1957 and 1962) for a six months' period ending June 30, 1965 and to an extension to the same date of the City-Company Agreement dated July 1, 1907 (as amended in 1932, 1939, 1950, 1957 and 1962). . . ."

He then read into the record a reply from the Mayor, dated December 17, 1964, which stated, in part,

> "I have received your letter of December 15th which appears to adequately set forth the understanding reached in my office on December 12th excepting that both parties simply recognize that the 1907 agreement continues in full force and effect until June 30th, 1965, rather than that it is 'extended' until that date. . . ."

When asked whether this letter from the Mayor stated the parties' understanding, Mr. von Starck answered that the letter had been discussed by Mr. Lyons and him; however, he was not permitted to state the discussion, for PTC again pleaded the attorney-client privilege.

Although the City's reserved right of purchase was not specifically mentioned in this exchange of letters, the exchange does not help intervenors, but rather hurts them, for it is consistent with the conclusion that the City's representatives, whether or not they said anything during the negotiations, about the City's reserved right of purchase, intended that that right should remain in effect, and hence that there was no mutual mistake, and it is inconsistent with

intervenors' assertion that the parties did not intend the Agreement of 1965 to refer to the City's reserved right of purchase.

(ii) *The testimony of the City Solicitor.*

Intervenors' second witness was Edward G. Bauer, Jr., Esquire, the City Solicitor. Apparently intervenors hoped to prove by Mr. Bauer that the City, as represented by Mr. Bauer, late in 1964, when the Agreement of 1965 was being negotiated, thought that its reserved right of purchase had expired. In fact intervenors proved the opposite. Mr. Bauer testified that it was his view as City Solicitor that the City's right of purchase had never expired, and that in the City's view the Agreement of 1965 meant what it said: it recognized that the right was still in effect.

Thus, Mr. Bauer said that he had been correctly quoted in a newsstory of February 26, 1965, which reported that "Bauer said the City retains the option 'as long as PTC is exercising its franchises'." (Intervenors' Exhibit I-1). And when he was asked about an earlier newsstory (Intervenors' Exhibit I-12), of December 29, 1964, which reported that "The city's option to buy PTC in 1965 will be allowed to expire Thursday, City Solicitor Edward G. Bauer, Jr., said today," Mr. Bauer answered that the report was incorrect; he said:

> "It does not [correctly portray what I stated to the Bulletin], Mr. Anderson. I did state that no notice of the exercise of the option would be given by the City prior to December 31st. I did not say that the City would permit the option to expire. I did say that we would not give notice as required under the option prior to December 31 of 1964, for the reason that there was no money in the capital budget.

> "It is an item for the capital budget in 1965. No known funds were available."

Mr. Bauer further noted, when counsel for intervenors continued to press him, that he was positive that he had not used the word "expire," and added,

> "As a matter of fact, I told the reporter that wrote that, the next day, and complained about the headline in [and?] the first paragraph. He apologized. He indicated to me that he did not write the headline."

It was also noted, during Mr. Bauer's testimony, that the same newsstory contradicted its headline and first paragraph by reporting in a later paragraph that "Bauer said the city contends that the option continues indefinitely, independent from the periodic renewals of the operating agreement."

It further became clear from Mr. Bauer's testimony how the Agreement of 1965 had evolved.

By October, 1964, the City and PTC had negotiated, so the City thought, an agreement that extended the Broad Street subway lease for two and one-half years, and that recognized the continued effectiveness of the Agreement of 1907, as amended, for the same period. A draft ordinance was prepared, stating this agreement; however, PTC's Executive Committee rejected it. On December 4, 1964, Albert G. Lyons, as President of PTC, made a statement to the Rules Committee of City Council (Intervenors' Exhibit I-16). He argued that rental under the Broad Street subway lease should be eliminated, and that payments under the Agreement of 1907, as amended, should be reduced. (He said nothing regarding the City's reserved right of purchase.) On December 12, 1964, an agreement was

reached extending the Broad Street subway lease, and recognizing the continued validity of the Agreement of 1907, for six months (instead of for two and one-half years). (This was also discussed by Mr. von Starck in his testimony, as has been noted above.) An enabling ordinance was approved by City Council on January 6, 1965. The agreement itself was received by the City Solicitor's office on February 3, 1965, executed by PTC; on February 5 it was signed by the Commissioner of Public Property, and on February 25 by the Mayor.

In the meantime SEPTA and PTC had been negotiating for the sale of PTC. During January, 1965, it developed that SEPTA was offering $62 million and PTC was asking $95 million (Intervenors' Exhibit I-14). The Mayor suggested that condemnation be considered. On February 17, 1965, representatives of SEPTA asked that the City assign its reserved right of purchase to SEPTA. The City agreed, and on February 25, 1965, the bill that became the ordinance authorizing the assignment was introduced.*

When intervenors' counsel asked Mr. Bauer what was the intention of the Agreement of 1965, Mr. Bauer replied,

> "Our intention, as a matter of fact, with [was that?] the 1907 Agreement including the option contained therein continued in full force and effect for the period of six months without the right of PTC during that period to contest its validity."

When counsel pressed Mr. Bauer with the suggestion "that you thought that there would be no point in extending the option rights of the City because such rights were self-extending," Mr. Bauer replied,

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* The ordinance was not enacted until June 4, 1965; it is Exhibit P-21.

> "No, it's not what I thought. I thought it would be in the City's interest to make certain that the PTC could not contest the validity of the 1907 Agreement although [interruption] our basic position remained the same the 1907 Agreement continues in full force and effect including the option clause just so long as the PTC exercises its franchises in Philadelphia."

And again:

> "I believed that it would be in the best interest of the City of Philadelphia to make certain that the PTC could not contest the validity of the 1907 Agreement in the same period of time as the Broad Street Subway was under lease to the company."

And still again, when asked, "Now if you thought that the PTC had no grounds to contest the effectiveness of the purchase option provisions of the 1907 Agreement, you must have thought that the provision for its continued recognition was mere surplusage, did you not?", Mr. Bauer replied,

> "No, because in October and November of 1964 they were still under an agreement which required both parties to recognize the validity of the 1907 Agreement. Thereafter through June 30 they were also under the same agreement which required them to recognize the validity of the 1907 Agreement. And during that period notice of the exercise of the option was given. So on that basis I state that I saw no basis for PTC contesting the validity of that option."

The City's position could hardly be more clearly stated, and what intervenors proved through Mr. Bauer not only did not help their case but destroyed it. Specifically, they proved that: (1) Mr. Bauer had correctly appraised the legal effect of the Agreement of 1907 as amended by the Agree-

ment of 1939: the City's reserved right of purchase continued in effect and had not expired; (2) when Mr. Bauer was confronted during the negotiations with PTC with the fact of the expiration of the Broad Street subway lease, and with the unwarranted assertion by PTC that the Agreement of 1907 had expired, he bargained for, and acquired, a period of six months during which the subway lease was extended and PTC could not press its assertion of expiration; and (3) he dealt on all sides with candor, being careful to ensure that the City's position was correctly stated not only to the public but to PTC (note in particular his correction of the newspaper reporter, and the Mayor's letter to PTC, disavowing PTC's use of the word "extension" and insisting that "both parties simply recognize that the 1907 agreement continues in full force and effect until June 30th, 1965, rather than that it is 'extended' until that date").

It is impossible even to argue, with any reason, much less to conclude, that Mr. Bauer's testimony proves either fraud or mistake; it proves the opposite.

In spite of this, at the oral argument intervenors' counsel attacked the conduct of Mr. Bauer and of SEPTA's representatives as though it afforded some ground for setting aside the Agreement of 1965. He contended that when SEPTA's representatives in February, 1965, suggested that the City assign its reserved right of purchase to SEPTA (this suggestion being made after PTC and the Commissioner of Public Property had signed the Agreement of 1965 but before the Mayor had), some one should have consulted PTC. If PTC had been consulted, he said, it would have refused to go ahead with the Agreement of 1965.

The argument is extraordinary, apart from the fact that whether PTC did or did not go ahead with the Agreement of 1965, the City's reserved right of purchase remained

effective. It is extraordinary because, as Mr. von Starck as well as Mr. Bauer explained, the Agreement of 1965 was simply the formalization of an understanding that had been reached in December, 1964. What intervenors argue, therefore, is, to put it simply, that for some reason they do not disclose, PTC had a right to repudiate its promises. The argument is further extraordinary because intervenors suggest no reason why, when SEPTA's representatives suggested to the City that the City assign its right of purchase to SEPTA, anyone was under any obligation to tell PTC. The assignment could not be made until Councilmanic approval was obtained. Accordingly, as has been stated, a bill to enable the assignment was introduced on February 25, 1965, which, after public hearings, was enacted as an ordinance on June 8, 1965. There was, therefore, full public disclosure and debate before the assignment was made.

(iii) *The testimony of Albert G. Lyons.*

Albert G. Lyons, President of PTC, was intervenors' last witness. He said that during the negotiations that led up to the Agreement of 1965 "there was no mention" of the City's reserved right of purchase, and that by executing the Agreement of 1965, "we did not" "intend to extend the [City's] option."

It is apparent that this testimony proved nothing that shows fraud or mistake; indeed, like Mr. Bauer's testimony, it did not help but destroyed intervenors' case. The fact of the absence during the negotiations of any reference to the City's right to purchase has been discussed above, when commenting on Mr. von Starck's testimony: and Mr. Lyon's intention in executing the Agreement of 1965 was correct; the Agreement did not "extend" the City's option; nor did the City intend it to (as has just been seen, in considering Mr. Bauer's testimony); nor, indeed, from Mr. Lyon's testimony, did PTC intend it to.

(iv) *Summary of intervenors' evidence.*

Intervenors did not prove anything that even suggests, much less establishes, fraud. They tried to prove mistake by trying to prove that the City intended to let the option "expire," but Mr. Bauer proved that the City intend to preserve the option. They tried to prove that PTC was under some mistake as to the effect of the Agreement of 1965, but Mr. von Starck did not say that he was mistaken, nor did Mr. Lyons.

Intervenors never specified in any pleading what their charges of "fraud, accident or mistake" meant. It is apparent now that they did not because they could not.

E. *Was the City's assignment of its reserved right of purchase to SEPTA invalid because made without a public auction? (Questions Presented, Question No. 3.)*

1. *The pertinent provision of the Agreements of 1907 and 1939, and the terms and manner of the assignment to SEPTA.*

Section Eleventh of the Agreement of 1907* provided that

> "The rights of the City under this paragraph [*i.e.*, the City's reserved right of purchase] shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger railway systems and may become a bidder for such rights."

Section 1(d) of the Agreement of 1939** amended these provisions in unimportant respects. The phrase,

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* Exhibit P-1.

** Exhibit P-6.

"the rights of the City under this paragraph," was changed to read, "The right of the City to purchase under this paragraph"; in the phrase, "a bidder for such rights," "rights" was changed to "right"; and "passenger railway systems" was changed to "passenger transportation systems."

On June 4, 1965, an ordinance was enacted authorizing the Commissioner of Public Property, on behalf of the City, to enter into an agreement assigning the City's reserved right of purchase to SEPTA.* On June 8, 1965, the City and SEPTA did enter into such an agreement,** and on the same day SEPTA exercised it.***

Section 1 of the assignment agreement assigned the City's reserved right of purchase to SEPTA. Section 2 provided that if SEPTA did not exercise the right within five years, it would reassign it to the City. Section 3 provided that SEPTA could not assign the City's assignment and recited that the parties intended to be legally bound.**** And Section 4 provided that if SEPTA acquired PTC's assets at a price no higher than provided in the formula set forth as part of the City's reserved right of purchase, SEPTA would succeed to PTC's rights and obligations under the leases and other agreements (including the Agreement of 1907, as amended) between the City and PTC, that the Broad Street subway lease would be extended for two years from the date that SEPTA acquired PTC's assets, and that there would be no reductions in the payments due the City under the leases and other agreements unless with the City's consent.

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* Exhibit P-21.

** Exhibit P-22.

*** Exhibit P-23.

**** It appeared from the trial that one of PTC's arguments against the assignment would be that it was without consideration. Apparently PTC has abandoned the argument, for it neither briefed nor made it orally. It may be noted that the assignment is also under seal.

The City's assignment to SEPTA was without notice to PTC, and was made without public auction or other competitive bidding.

2. *PTC's argument against the assignment.*

Until oral argument SEPTA and the City evidently believed, because they briefed the point, that PTC contended that the Agreements of 1907 and 1939 required that before the City could assign its reserved right of purchase it had to conduct a public auction. It appears, however, that PTC has abandoned this argument, if it did intend to make it, for it did not brief the point; also, the Court understood PTC's oral argument as abandoning the point. In any case, the argument is without merit. The provisions of the agreements of 1907 and 1939 distinguish between "shall" and "may": the City's reserved right of purchase "shall be assignable and may be put up at public auction." And see *Commonwealth v. A. M. Byers Co.*, 346 Pa. 555, 561 (1943) ("the word 'may' clearly implies discretionary power. The language is permissive, rather than mandatory"); *Connell, Aplnt., v. Kennett Twp. et al.*, 356 Pa. 585, 589 (1947); *Blandon Boro. Incorporation Case,* 182 Pa. Superior Ct. 304, 309 (1956); and *Weiner v. Hospital Service Plan,* 13 D. & C. 2d 689, 692, *aff'd per curiam,* 187 Pa. Superior Ct. 244 (1958) ("Although the word 'shall' might, in a proper setting, be interpreted as permissive, the word 'may' can never be given the imperative meaning").

Instead, PTC's argument is that the Philadelphia Home Rule Charter, adpoted by the electors on April 17, 1951, has intervened, and that it requires that before the City could assign its reserved right of purchase it had to conduct a public auction.

The only provisions of the Home Rule Charter that require public bidding are Sections 5-900(a)(4), 6-500, and

8-200, and 8-201. PTC does refer to Sections 6-500, 8-200, and 8-201, as showing that the Charter in a general way favors public bidding, but the only section that it contends required the City to assign its reserved right of purchase to the highest bidder at a public auction is Section 5-900 (a)(4). ("This is the procedure which the City Council by-passed . . . .", PTC states in its brief.)

Before any of these sections is considered, it must be decided whether the Charter does supersede the Agreements of 1907 and 1939.

3. *The Philadelphia Home Rule Charter is irrelevant.*

There can be no question that this is so.

The Home Rule Charter was written and adopted pursuant to the First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, 53 PS §13101. The importance of this source cannot be stated more clearly or forcefully than it was by Mr. Chief Justice Bell for a unanimous Court in *Cali v. Philadelphia, Appellant,* 406 Pa. 290, 295-298 (1962):

> "The Charter owes its breath of life and its very existence first to the Constitution of Pennsylvania, and secondly, to the enabling Act which gave it its birth, its powers and its limitations, namely, the First Class City Home Rule Act of 1949, supra.
>
> ". . . .
>
> "We must . . . first examine the Constitution. . . .
>
> "In *Commonwealth ex rel. Truscott v. Philadelphia,* 380 Pa., supra, the Court said (page 370): 'The so-called Home Rule Amendment to the Constitution, *Article XV, §1,* adopted November 7, 1922, provided: "Cities . . . may be given [by the legislature] the right and power to frame and adopt their own charters and to exercise the powers and authority of local self-gov-

ernment, *subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature.*"

". . . .

". . . .

"When the City-County Consolidation Amendment of 1951 . . . was adopted, very many citizens believed . . . that they were securing . . . full and complete home rule . . . [but the Constitution and Enabling Act] make clear that they acquired no such absolute and unconditional untrammeled right [footnote omitted]."

Section 11 of the Enabling Act, 53 PS §13111, provides that

"Any new Charter . . . thus proposed . . . [and] approved . . . shall become the organic law of the city. . . . No contract existing at the time of the adoption or amendment of a Charter by a City under the provisions of this act shall be affected thereby, but such contract shall have the same force and effect and be of the same validity as if such Charter had not been adopted or amended."

Accordingly: The City's reserved right of purchase is provided by the Agreement of 1939; this agreement was a "contract existing at the time" the Charter was adopted, in 1951; therefore, its terms are to be applied "as if such Charter had not been adopted"; its terms do not, as PTC apparently concedes, require that the City assign its reserved right of purchase to the highest bidder at a public auction; therefore, no matter what the Charter provides about public auctions, the provisions are here irrelevant.*

* SEPTA and the City also argue that the provisions of the Charter are irrelevant because of the Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P.L. 984, 66 PS

4. *If the Philadelphia Home Rule Charter did apply to the Agreement of 1939, it would not require that the City must assign its reserved right of purchase to the highest bidder at a public auction.*

This discussion is logically unnecessary; the only reason for it is that PTC has argued with such vigor, and with such inflammatory language,(*) that public auction was required that it seems appropriate to note that even if the Charter did apply to the Agreement of 1939, it would not require an auction.

As has been noted, the only section of the Charter that PTC says the City violated is Section 5-900(a)(4).

Section 5-900(a)(4) is in two clauses; the first clause provides that

> "The Department [of Public Property] shall, whenever authorized by ordinance, purchase, condemn in the manner provided by law, lease or otherwise ac-

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§ 2001, *et seq.* SEPTA was created pursuant to this Act. Section 26 of the Act, 66 PS § 2026, provides that

> "Any county, municipality, school district, corporation or person, or group, [*i.e.*, Philadelphia] may and they are hereby authorized to sell, lease, lend, grant, convey, transfer or pay over [*i.e.*, assign] to any authority [*i.e.*, SEPTA], with or without consideration, any project or any part or parts thereof, or any interest in real or personal property or any funds available for building construction or improvement purposes, including the proceeds of bonds previously or hereafter issued for building construction or improvement purposes, or any money or thing of value, including services, which may be used by the authority in the construction, acquisition, improvement, maintenance or operation of any project or for any of its corporate purposes [*i.e.*, the City's reserved right of purchase], any other law to the contrary notwithstanding."

The argument would have force, except, as has just been seen, the Charter does not apply to the Agreement of 1939 and hence so far as that agreement is concerned it is not a law repealed by the Metropolitan Transportation Authorities Act of 1963.

(*) E.g., "This improvident action"; "giveaway ordinances"

> quire such grounds, buildings and building accommodations, structures and facilities as may be required by the City; . . . ."

This clause is not pertinent. By assigning its reserved right of purchase to SEPTA the City did not "acquire . . . grounds, buildings and building accommodations, structures and facilities"; and in any case, the clause does not require that the acquisition be by public bidding; it does provide that it shall be "in the manner provided by law, lease or otherwise"; here, "otherwise" would mean as provided by the Agreement of 1939.

The second clause of Section 5-900(a)(4) is:

> "and whenever any City real estate is not being used in connection with the work of any department, board or commission of the City or any other governmental agency, the Department may rent, or when authorized by the Council, sell the same upon the best terms obtainable after appropriate public advertising and the receipt of competitive bids."

This clause is not pertinent. It only applies to a sale or lease of "City real estate." The assignment was not such a transaction: it was not a sale, nor a lease; it did not involve any "City real estate"; as was seen when discussing the rule against perpetuities, the Agreement of 1939 is exclusively contractual and created no interest in any real estate until it was exercised.* Furthermore, if "City real

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* SEPTA also argues that if "City real estate" was involved, it was not real estate "not being used" by the City, citing Formal Opinions No. 199, 1957 City Solicitor's Opinions, page 9, that this language refers to "surplus real property." However, in view of what has been said, the point need not be decided. By a footnote in its brief PTC suggested that Section 2-307 of the Home Rule Charter required City Planning Commission approval of the ordinance authorizing the assignment to SEPTA, as a "bill which would authorize acquisition or sale of City real estate." Since the assignment did not effect an acquisition or sale of City real estate, the suggestion is beside the point.

estate" were involved, it would not be real estate "not being used in connection with the work of any other . . . governmental agency," because SEPTA is a governmental agency (it "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof": 66 PS §2004). This is discussed more fully in the next section.

5. *There is no requirement of public policy that the City's assignment should be by public auction, public policy is to the contrary.*

Despite PTC's rather heated brief, there is nothing to be deplored in concluding that the Home Rule Charter does not require the City to assign its reserved right of purchase to the highest bidder. Quite the contrary.

The reason for requiring competitive bidding is to prevent the governmental body from awarding a contract to one individual rather than to another because of favoritism, improvidence, or corruption. See the recent decision of the Supreme Court in *Price & Masuda v. The Philadelphia Parking Authority,* No. 252, January Term, 1965, filed June 24, 1966. Here the City by assigning its reserved right of purchase is making no choice between private individuals or companies. Rather, the City as one public body is transferring its right to SEPTA as another public body.

The City correctly argues that it has a paramount interest in deciding who should use its streets for public transit. As has been seen, it surrendered that interest by the Agreement of 1907; but it got it back by the Agreement of 1939. It would be extraordinary if it should now be held, after all this history, that the City had not got what it thought it had, but that it had to yield to the highest bidder, whoever that might be. What PTC's argument comes down to is that PTC (or whoever is the highest bidder),

and not the City, should control the use of the City streets.

Morover, in assigning its reserved right of purchase to SEPTA the City has acted for reasons that the Legislature has found to be proper. In enacting the Metropolitan Transportation Authorities Act of 1963, *supra,* the Legislature, in Section 2, 66 PS §2002, made findings that stated in a most vigorous way that in its judgment public transportation could no longer be conducted on a community by community basis but had to be conducted on a regional basis. The Legislature's findings included these:

> "(a) That there exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated obsolete mass transportation facilities . . .;
>
> "(b) That such conditions . . . have made and will continue to result in making such communities economic and social liabilities, harmful to the social and economic well-being of the entire area,* depreciating values therein, reducing the tax revenues, making the metropolitan areas and their constituent communities less desirable areas in which to live and work and thereby depreciating further the general community-wide values; . . . .
>
> "(e) That the well-being and economic health of the counties and other communities in the metropolitan areas require integrated systems of mass passenger transportation;"

It is evident from the City's assignment of its reserved right of purchase to SEPTA that the City arrived at the

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* Defined by Section 3 of the Act, 66 PS § 2003, as "all of the territory within the boundaries of any county of the first class and all other counties located in whole or in part within twenty (20) miles of such first class county."

same conclusions as the Legislature. Instead of public transit being furnished to the City's inhabitants by PTC on a local basis, it will be furnished by SEPTA on a regional basis. The decision that this should be so was within the City's power; and the manner in which it made the decision, by assigning its right to purchase PTC to SEPTA, was in accordance with the Agreement of 1939.

F. *What does "undistributed corporate surplus" mean? (Questions Presented, Question No. 4.)*

It having been decided that the City's reserved right of purchase, and the assignment of the right by the City to SEPTA, are valid, the next question is, What is the meaning of the purchase price formula stated as part of the reserved right of purchase?

The formula consists of four factors:

1) "an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries . . . .";

2) "plus the par value of all then outstanding preferred stock of Company . . . .;"

3) "and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company . . . .; and

4) "and the amount of the then undistributed corporate surplus, if any, of Company."

The word "then" in the statement of each of these factors refers to the particular July 1st named in the notice of intent to exercise the right of purchase. The open-

ing sentence of Section Eleventh states that "The City reserves the right to purchase . . . upon any first day of July . . . by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice . . . . [the four amounts just stated]". In this notice of intent to exercise the right to purchase, SEPTA named July 1, 1966, as the settlement date; and when the parties entered into settlement negotiations, this was extended to January 1, 1967. It is, therefore, not possible to state now what will be the amounts that SEPTA must pay. Nor would it be appropriate to. As was explained in the opinion of this Court on PTC's answer raising questions of law concerning jurisdiction, *aff'd* 419 Pa. 471 (1965), this action, as a declaratory judgment action, is not to determine the amount that SEPTA must pay but to declare how that amount is to be computed under the Agreement of 1907, as amended by the Agreement of 1939.

The only substantial question about any of the factors of the formula is with respect to "undistributed corporate surplus." PTC no longer has any preferred stock, so the second factor is eliminated; and there should be no problem in determining the amount of the bonds, mortgages, ground rents, and outstanding common stock, which takes care of the first and third factors. There is, however, deep and basic disagreement about the meaning of "undistributed corporate surplus."

1. *PTC's argument, that "undistributed corporate surplus" is the excess of the value of its assets over the value of its liabilities and capital as of the settlement date, is unsound. "Undistributed corporate surplus" is a balance sheet figure.*

At the trial, principal counsel for PTC stated that PTC's position was that "undistributed corporate surplus"

means the appraised value of PTC's assets as compared to the liabilities and capital as of the settlement date; he added that as he understood the nature of this proceeding, it would not be appropriate to offer appraisal evidence, for the proceeding was only to determine if PTC's interpretation of "undistributed corporate surplus" were correct; if it was, it would then be in order to have an appraisal of PTC's assets made, so that SEPTA could know what to pay on the settlement date.

Later in the trial other counsel for PTC offered to prove at the trial what was the appraisal value of PTC's assets. And later, counsel for the intervening minority shareholders made the same offer.

The offers to prove appraisal value were objected to, and the objections were sustained. The understanding of principal counsel for PTC, of what is the scope of this proceeding as an action for a declaratory judgment, was correct; as has just been discussed, above, this proceeding is to declare the validity and meaning of a purchase price formula, not to award a judgment stating the amount of money SEPTA must pay PTC, if the formula is valid.

However, and more basic, the objections to the offers to prove appraisal value were correctly sustained because, as will now appear, "undistributed corporate surplus" cannot mean "surplus as determined by an appraisal of the Company's assets as of the settlement date named in the notice exercising the right of purchase." It can only mean, "undistributed corporate surplus as stated on the Company's balance sheet" as of the settlement date.

There are several reasons for rejecting PTC's contention.

One of the great attractions of a purchase price formula is that the buyer can figure out what the price will be before he exercises his option and commits himself to pur-

chase. A valuation proceeding after the option is exercised defeats this purpose.

This is so on general principles. Thus the Supreme Court, in *Philadelphia v. Phila. T. Co., Aplnt.*, 386 Pa. 231, 239 (1956), said of the purchase price formula:

> "... the price to be paid for the property according to the option is determinable by a fixed formula whereas a condemnation proceeding must depend upon the uncertain decision of a fact-finding tribunal as to the value of the property then being acquired."*

In addition, the history of the underliers and PRT, the other provisions of the agreement, and the legislative history of the formula itself, all demonstrate that "undistributed corporate surplus" is not a valuation but a balance sheet figure.

The history of the underliers and PRT demonstrated the ruin that could be brought about by a failure to control valuations. As the decisions of the Public Utility Commission that have been cited make plain, the principal difficulty in reorganizing the bankrupt PRT was that there could be no certainty about what was the value of the underliers' franchises. It is inevitable that by 1939 the City would be wary of committing itself to purchase under a formula that would include as one of its factors unrealized appreciation, to be determined by an appraisal proceeding after the option to purchase at the formula price had been exercised.

Moreover, the other provisions of the Agreement of 1939 gave the City control over the other factors of the formula. Section First of the Agreement of 1907, which was not amended but continued in effect by the Agreement

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* SEPTA and the City argue that this decision makes *res adjudicata* any question whether "undistributed corporate surplus" is a "fixed" figure or a "valuation" figure. However, as will appear, this point need not be decided.

of 1939, provided that "No further increase of capital stock or funded indebtedness . . . shall be made by the Company . . . without the consent of the City. . . ." Also if more bonds were issued by the Company, there would be a corresponding increase of assets, which the City would acquire if it exercised its right to purchase. Still further, the City was entitled to representation on the board of directors (Section Fourth of the Agreement of 1907 and Section 1(a) of the Agreement of 1939), and the City Controller was empowered to examine the Company's books (Section Fifth of the Agreement of 1907, continued in effect by the Agreement of 1939).

Thus PTC's argument comes down to an assertion that of the four factors of the formula, all could be controlled by the City, and could be determined by an examination of the balance sheet, before the City decided whether to exercise its right of purchase, except for one factor—"undistributed corporate surplus." This assertion is almost self-defeating. In any case, the hearings before the Transportation and Public Utilities Committee of City Council in April and May of 1939 demonstrate that both PRT (seeking the City's consent to be reorganized as PTC) and the City understood the formula to be a simple mathematical calculation based on book figures.

In essence, what the hearings demonstrate is that PTC's present argument as to the meaning of "undistributed surplus" is based upon a practice precisely contrary to the purpose of the Agreement of 1939. In PTC's present view the 1939 amendment called for PTC to reap the benefits of any increase in the unrealized value of its assets in the event of a sale to the City under the City's option. The hearings make it clear that the formula was to do just the opposite: the City was to reap any increase in the unrealized value of PTC's assets, if, but only if, the City exer-

cised its option and thereby purchased the PTC system as a whole.

It will be best first to state how this was worked out, and then to demonstrate the statement by quotations from the Transportation Committee hearings.

It will be recalled that under the Agreement of 1907 the City could purchase only PRT's assets, and these did not include the underliers' franchises. After the Agreement of 1907, when the transit situation became chaotic, the City acquired the right to condemn the underliers, but it never exercised the right because the estimated value of the underliers' franchises, following the McChord Report, was so high. Also after the Agreement of 1907, PRT expanded its bus operations. In granting the franchises for these, the City reserved a right to purchase the buses. The bargain that was struck as a result of the hearings before the Transportation Committee, and that resulted in the Agreement of 1939 and the City's consent to the reorganization of PRT as PTC, was that the City would keep its option to purchase the transit system, because after the reorganization this would include the right to purchase the underliers' franchises; it would give up its option to purchase the bus system; hence, its only option would be to take either the entire transit system or none of it; the only way the City could take less than the entire transit system would be by condemnation; accordingly, it reserved its condemnation rights.

The result of this arrangement was that by exercising its condemnation power the City could acquire the transit system at less than the book figures if the value of the assets had declined from book value, and by exercising its option right the City could acquire the assets at less than their market value if the assets had appreciated. The fear of the Company that the City might exercise its option to take

over a very profitable part of the system at a "bargain price" was alleviated by confining the option to an option to take the entire system. Any piecemeal taking by the City would have to be by condemnation in which the Company would receive the fair market value of the specific assets taken. In the event the City decided to take the entire system, it could do so by condemnation or by the option to purchase—whichever would result in a lower price.

It is now in order to quote from the Transportation Committee hearings. As indicated, they demonstrate the accuracy of the conclusions stated. Indeed, the speakers hammer the points so hard that there can be no reasonable doubt that PTC's argument is in error, and that the formula price excludes any unrealized appreciation of assets, and is a balance sheet figure. Herewith the proceedings of the Committee in pertinent part.

At the hearing of April 26, 1939, it was said:

> "Mr. Herman N. Schwartz:* No. By the first act, what was referred to as the Daix Act. Under the 1907 agreement we had the right to go in and recapture at a price fixed in that agreement. But the only thing we could recapture was the interest of the P.R.T., which would have brought us the physical property which was claimed by the underliers. Then came the 1927 Act, I think, what we call the Daix Act, which gave us the right to condemn the underlier property under which the 1928 proceedings was started, and a valuation of underlier property was fixed of $139,000,000 for their property, and $10,000,000 for their bonds on the Market Street Elevated, $149,000,000, which would have given us the underliers but would not have given us the P.R.T., which we then could have gotten for, at that time, I think it was about fifty-four million,

* Assistant City Solicitor.

under the 1907 agreement. Then two years after that came the Woodward amendment to the Daix Act which gave us the right to condemn piecemeal.

"Now as I read this amendment in this pink bill,* we there have a double right. It reserves to us the right in the 1907 agreement to recapture, except that that right to recapture is both the property which was the P.R.T. property and the property which was the underlier property. We retained that right under this pink amendment.

"In addition to that we also reserve the right to condemn it under the Acts of Assembly. That is, it broadens our rights.

"So that you have a situation at the present capitalization of $85,000,000,** let us assume that that is a decrease of two or three million by reason of the operation of the sinking fund, and some of the bonds being paid off every ten years from now, the property is worth the $85,000,000 or more. We can go on and buy it for $85,000,000. If it is depreciated in value and is only worth $60,000,000, we don't recapture. We go in and condemn and fix the valuation at sixty.

"So what this thing does, it gives us a double right, the right to recapture and the right to condemn.

"MR. BALLARD:(*) I agree that that statement is correct.

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* Which became the ordinance authorizing the Agreement of 1939.

** See the decision of the Public Utility Commission discussed above in the history of the Agreement of 1939; when the Commission approved the Second Revised Plan of Reorganization, as amended November 15, 1938 (Exhibit P-8).

(*) Counsel for PRT.

"MR. HERMAN N. SCHWARTZ:** I don't think that is quite right. You speak of the $30,000,000 of prior preferred stock. That all goes out of the picture under this amendment. There is substituted for the preferred and common stock of the P.R.T., and for whatever rights the underliers or lessor companies may have in the property, the new capitalization. So that a day after this plan went into effect we wanted to purchase, we would purchase for the amount of the capitalization of the common stock carried at the stated value of ten, or $85,000,000. Each five years after that $2,000,000 worth of bonds have been retired by reason of the operation of the sinking funds. And no new capital has been obtained, either funded debt or stock. Then we could buy for $83,000,000.

"If, on the other hand, the Company had made $5,000,000 improvements, by borrowing money, they have to get our consent before they can do it. Then they would have $88,000,000 there, and that is what it would cost us. It would cost us as a base $85,000,000, less retirements and maturities, plus anything which we consented they should put in. If it were worth that amount we could purchase. If we thought we were getting a good bargain, the system was worth $100,000,000 on our valuation, and we could buy it for $85,000,000, we would make our bargain that way and make the difference. If the system depreciated in value and was worth only $70,000,000, instead of paying $85,000,000 for it, we would condemn and have a valuation placed on it, and buy for $70,000,000. So that in either event we would exercise our option, and exercise that option which we thought would be the best bargain for the City.

** Responding to a question from a citizen (Edwin O. Lewis, later Judge of the Court of Common Pleas).

"I don't know whether I make it clear or not, but that is the way the picture appears to me.

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"MR. BALLARD: The rights that the City ought to see protected, or better, if possible, I am now going to take up briefly, one by one . . .

"Now we come to your option under the 1907 contract. And as Mr. Schwartz pointed out, it was an option to purchase for thirty million of common and fourteen million of preferred. It is practically an option to purchase for $44,000,000, not the ownership of the whole system but P.R.T.'s ownership in it. And anybody who has followed the five years in litigation down here in the courts, and any lawyer or any man in public life who reads these series of leases will understand perfectly well how much doubt there is as to the extent of P.R.T.'s ownership, being a tenant that came into possession as an operating tenant of an existing system in 1902. Your option to purchase only takes junior interest, doubtful what it was, for $44,000,000, is now converted through our policy in an option to purchase the absolute and entire ownership, not just the junior interest for forty-four million, plus the underlier interest for a hundred and forty-nine million, which is what is talked about: that would have made one hundred and ninety million, pretty near, for the whole thing. But for the whole option you purchase it without cloud on title for a base price of $85,000,000, which, as Mr. Schwartz pointed out, may go up with the issue of new securities which have to have your approval, and down with the retirement of old securities through sinking funds . . .

"MR. BALLARD: [after answering several questions] I don't think there is any doubt about that, Mr. Crossan,—if I may go on, because I am short of time.

"Heretofore this sort of bum option that you had you could only exercise in 1957. Now under our proposal this much better option we propose, that you shall have the right to exercise it on July 1st of any year, not July 1st, 1957 or any year thereafter.

"Now I say you get more property for less money, no cloud on title, and the current right to exercise that option.

"So in the matter of the City further protecting its option right, I say there is only one conclusion possible under our proposal, and that is that you are not only protected but you are getting a lot better right.

"Now the question came up, and I was in conference with Mr. White, Mr. Schwartz and Mr. Sharfsin, about your right to condemn, the question Mr. Lewis raised. He wanted to preserve the right to condemn, and we want to preserve it too, whatever right the Legislature might be able to give you under this or any future law. And the proviso that Mr. Kelly read to Mr. Lewis is the best language I can find in it. Any right you have now or later on under any condemnation statute that you can get the Legislature to pass, you are not giving up that right. You have the public right plus whatever at any time your legal right may be. So in that regard you bettered the City's position."

At the third hearing, on May 1, 1939, the following occurred:

"MR. TRAINER:* Mr. Ballard, how would this affect the Act of Assembly? I think there is an Act of

* Harry J. Trainer, a Councilman.

Assembly, if my memory is accurate, where the City has a right to condemn the bus lines. We have already served you with notice that we were going to take them over. What effect would that have on the franchises? Then do the franchises under that act have no value?

"MR. BALLARD: Mr. Trainer, that is not an Act of Assembly. That was an option that you reserved when you gave us the bus franchise.

"Now our intention here is to give you an option at a greatly reduced price on the whole system, all or none, but not to give you an option to dismember the system. If you are going to dismember the system and want to try to take the Market Street line, which was suggested some years ago, you may recall, then you are thrown back to or thrown forward, whichever you call it, to your full rights of condemnation under the Daix Bill or the Woodward Bill, or any future bill that may be passed.

"MR. TRAINER: Would this provision repeal that part of the ordinance?

"MR. BALLARD: This provision eliminates the separate option to purchase the buses, yes, sir. The option is on the entire system and is in lieu of all existing options of the whole or parts of the system. But it does not impair your condemnation rights.

• • •

"MR. BALLARD: That is the intention. We can't really contemplate going forward and expending a large part of this five or six million dollar fund on buses to feed our lines and feed the City's lines, issuing securities in the nature of equipment trusts to buy them, perhaps in any way committing ourselves to purchase, and at the same time giving the City a right to

come in and take them away from us at depreciated cost. We realize the City should have every right of condemnation that the Legislature wants to give it, but I just can't go to any of the security holders and investors in this system and say, 'Here, we have got,' as I hope we will, 'the City's consent to reorganize this property. We are going to motorize quite a number of our lines. We are going to put a lot of our capital in new buses. But after we have committed ourselves to a major proportion of bus operation, we are going to give the City a right to buy them out at depreciated value.' Now you had that right in the original bus consent ordinances, but the law has changed since then and our Supreme Court has held that the franchise to operate a bus comes not from City Councils, as is true in the case of a street railway, it comes solely from a certificate of public convenience from the Public Utility Commission, at whose mercy we all are in the matter of bus franchises.

"I just wish you would all consider as impartial business men, as I know you will, whether it is quite fair to these common stockholders and these employees, and these 53,000 people that own this system, to have them go forward and spend money on a rehabilitation program in which buses play a great part, and reserve to the City the right at any time to take the buses away at depreciated value. So that paragraph means exactly, is intended to mean exactly that. We give you an option. You don't have to go to the Board of View, or condemnation, or anything. We give you an option to buy a whole system with a greatly reduced price.

"We know we can't stand in the way of any condemnation right that you have under existing legisla-

tion—it seems quite ample—or under new legislation, which I have no doubt the City could have at any time the City felt it needed new legislation.

"I don't want to not be frank about the matter. In the past you never did exercise this bus option right, although you did, Mr. Trainer, give notice in one case while this litigation was pending."

And finally, at the fourth hearing, on May 5, 1939, the Assistant City Solicitor in responding to a question from Mr. Lewis about the bus system said this:

"MR. HERMAN N. SCHWARTZ: If we accept it, and buy the whole system, and don't buy that, we don't have feeders for our lines. Therefore, if we got the whole system, we certainly want that. But the second purpose is this. Why should we accept anything? The price is fixed at the amount of the outstanding obligations plus the par and stated value of the two classes of stock. The price is fixed. Today we would have to give them $85,000,000. Why should we take three-quarters for eighty-five million, or nine-tenths? We get everything for our price. I don't know why we should eliminate that [the bus system]."

Nothing could be clearer. There need only be added the observation that the City's reservation of its power of condemnation also meant that the stockholders were not guaranteed even the par value of their stock. The Public Utility Commission viewed PTC as a reorganized company in which $85,000,000 of securities were issued against about $65,000,000 of assets. Had condemnation taken place immediately, the common stockholders would have received very little. The purchase price formula as stated in the City's option, on the other hand, allows a return to the stockholders greater than the value of their original stock.

The increase in the value of the Company from the time of the reorganization until the time when the value of the assets minus the liabilities equals the stated value of the stock goes to the stockholders under the option formula. Beyond that any increase in value due to unrealized appreciation goes to the City.

2. *"Undistributed corporate surplus" as applied to PTC's present balance sheet means PTC's "Retained Earnings."*

The question is, Why did the draftsmen of the Agreement of 1939 select the phrase "undistributed corporate surplus"? To answer the question one must put himself in the position that the draftsmen were in. They wanted to be sure that the new company, PTC, would be able to operate in a business-like way, which is to say that its directors should be able to accumulate earnings, rather than paying them out as cash dividends, if business considerations suggested that that was wise. Accordingly, it was necessary to add to the statement of the formula by which the City's purchase price would be determined, a factor that would represent such accumulated earnings. Otherwise the directors would be unwilling to accumulate earnings because if they did accumulate them, the City might exercise its option (which, after the Agreement of 1939, it could do on July 1 of any year, upon six months notice) and by paying the formula purchase price it would acquire the Company's assets without paying an additional amount to cover the earnings that might have been distributed but had not been.

If the only shareholders of the reorganized company, PTC, had been common shareholders, it is apparent that this objective could have been achieved by adding to the formula purchase price the phrase "earned surplus" or "retained earnings". However, PTC's opening capitali-

zation included preferred shareholders as well as common shareholders.

PRT had also preferred shareholders. Their dividend rights had been cumulative whether the dividends were earned or not. As a result virtually no dividends had been paid to the PRT common shareholders, and the accumulation of preferred stock dividends had become so great that it would have taken many years of earnings before common shareholders would have been entitled to dividends. One objective of the persons who prepared the plan of reorganization was to try to insure that the new Company, PTC, would not be under such a burden, which is to say that it was hoped that investors would be encouraged to invest in the common stock of the new Company because they would have a reasonable chance to receive dividends. Also, as indicated in the Public Utility Commission Reports, there was a good deal of sympathy for the persons who had been the common shareholders of PRT, many of whom by an exchange of stock in the reorganization became the common shareholders of PTC.

The outcome of these considerations was that the Articles of Incorporation of PTC provided that the preferred shareholders should receive dividends that would be accumulated only if earned.* Therefore, if the Company should have a year in which it suffered a deficit rather than earning a profit, as to that year there would be no accumulated dividends for preferred shares. The exact conditions under which the preferred shareholders were entitled to dividends were stated in the Articles of Incorporation as follows:

> "The respective rights, preferences, privileges and restrictions of the preferred and common shares shall be as follows:

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* Exhibit P-8.

"1. Dividends on the preferred shares shall be non-cumulative unless earned, but to the extent of all surplus earnings not exceeding One Dollar ($1.00) per share per annum, and to the extent of all surplus earnings available for participating dividends as herein provided, shall be cumulative; and no dividends shall at any time be paid on the common shares unless and until the corporation shall have paid, or made provision to pay, to the holders of the preferred shares, the full amount of all dividends earned and accumulated thereon, as aforesaid, and unpaid, prior to the year for which such dividend on the common shares shall be paid. The preferred shares shall have the right to receive dividends, when declared, at the rate of One Dollar ($1.00) per share thereof for any year out of the surplus earnings of such year before any dividends shall be declared or paid for such year upon the common shares. After the preferred shares shall have received a dividend of One Dollar ($1.00) per share for any one year they will not then be entitled to receive any further dividend for such year unless a dividend of One Dollar ($1.00) per share shall have been earned and paid or declared for such year on the common shares; after a dividend of One Dollar ($1.00) per share shall have been earned and paid or declared on the common shares for such year, the preferred shares will then be entitled to participate with the common shares in all further dividends declared or paid for such year as follows: the amount of such further dividend per share of the preferred shares shall be one and one-half times the amount of such further dividend per share of the common shares."

In addition, PTC's Articles of Incorporation provided what should happen if the Company dissolved or were liq-

uidated, and as to preferred shares the procedure was as follows:

> "2. In the event of any dissolution or liquidation (whether voluntary or involuntary) of the corporation, the preferred shares shall be entitled to receive out of the corporate assets the par value of said shares and an amount equal to the amount of dividends then earned and accumulated and unpaid thereon, if any, before any payment shall be made to the common shares and the preferred shares shall not be entitled to participate further in any distribution of the assets of the corporation."

From the foregoing it appears that it was possible that PTC would have earned, accumulated, but unpaid dividends on preferred shares in an amount that would exceed the amount of "earned surplus" (or "retained earnings") at the end of a given year. Suppose that with the books in this condition the City exercised its option? How could the draftsmen be sure that the City would pay an amount (in addition to the other factors mentioned in the formula) that would accomplish the objectives that have been mentioned above, in other words, that would return to the shareholders dividends that the directors might have declared but for business reasons had not declared?

Had the draftsmen provided for a sum equal to retained earnings, the total amount payable to PTC under the formula would not have been enough to allow PTC to pay off its debt, pay the par value of its preferred, plus the earned, accumulated, but unpaid dividends on the preferred, and pay the common shareholders $10 a share. The result would have been that the Common shareholders would have gotten less than $10 a share.

Plainly, it was the desire of the draftsmen to insure that when the City paid to the Company as one factor of the

formula $10 for each share of outstanding common stock, if the Company then liquidated, it would have received enough from the City to ensure that the common shareholders each got $10 a share and did not get something less because of an obligation by the Company in liquidating to pay preferred shareholders earned, accumulated, but unpaid dividends. This protection of the common shareholders is another aspect of the general desire that has been mentioned above to protect the common shareholders after their unhappy experience with PRT.

Thus, "undistributed corporate surplus" means that the City pays the retained earnings or the earned, accumulated, but unpaid dividends, whichever is the greater amount. If the "earned surplus" (or "retained earnings") is greater than the preferred shareholders' earned, accumulated, but unpaid dividends, upon the City's paying the amount of the earned surplus, both the preferred and common shareholders will receive the dividends that might have been but were not declared. If the earned surplus is less than the preferred shareholders' earned, accumulated, but unpaid dividends, upon the City's paying PTC the amount of the earned, accumulated, but unpaid dividends, as well as paying PTC the amounts required by the other factors of the formula, the total price will be sufficient to return to the common shareholders $10 a share, as well as to retire PTC's bonds, mortgages and ground rents, and pay its preferred shareholders their par value and their dividends.

In 1955 PTC exchanged its preferred stock for common stock. This did affect the formula provided in the City's option by eliminating one factor—an amount equal to the par value of outstanding preferred stock. It did not affect the formula so far as "undistributed corporate surplus" was concerned. Since there is no longer any pre-

ferred stock, there are no earned, accumulated, but unpaid dividends that the City must pay. But by having to pay, as "undistributed corporate surplus," the amount of the "earned surplus," or "retained earnings," the City must pay enough to ensure that what was always the purpose of the formula as to the common shareholders is achieved: the common shareholders get back what they have risked: so much of the accumulated earnings as were not paid to them in dividends.

PTC's present balance sheet carries two accounts: "Capital Surplus" and "Retained Earnings".* As has just been seen, "undistributed corporate surplus" means a fund available for the payment of cash dividends. Therefore, it includes only PTC's "Retained Earnings" account. It does not include the "Capital Surplus" account because under Pennsylvania law cash dividends cannot be paid from capital surplus. *Branch, Trustee, v. Kaiser, et al., Appellant,* 291 Pa. 543 (1938); *Berks Broadcasting Co. v. Gaumer et al.,* 356 Pa. 620 (1947).

There has been considerable argument, orally and in briefs, regarding the origin of PTC's capital surplus, PTC contending that the opening capital surplus account was with the approval of the Public Utility Commission, and SEPTA and the City contending that the account was improper and was opened contrary to findings of the Commission when it approved the reorganization of PRT. In view of the foregoing, this argument need not be resolved.

3. Is PTC's "undistributed corporate surplus" extinguished by its obligation to its retired employees?

PTC pays pensions to its employees on a pay-as-you-go basis. It does not have a funded pension plan. Footnote 9 to PTC's Annual Report for 1965, states in part that

* Exhibit D-44.

> "It is estimated on the basis of actuarial studies, that the approximate amounts required to fund the past service costs would be as follows: $11,938,392 for present pensioners who were nonsupervisory employes; $4,973,304 for present pensioners who were supervisory employes, officers, or other executive personnel; . . . ."*

Similar footnotes have appeared in the annual reports since 1950.**

At the pre-trial conference and the trial it was stipulated that this obligation, of about $17,000,000 as of December 31, 1965, to retired employees is a present vested obligation, or liability (and the obligation was similarly referred to during testimony).

The present question is whether PTC's pension obligation affects the computation of the undistributed corporate surplus that SEPTA must pay for under the formula. As the trial developed, almost all of the testimony revolved around the parties' various views of how this question should be answered. In the Court's view, however, the testimony was almost all irrelevant. The answer to the question may be found, as has been seen to be true of the other questions raised in this litigation, by an examination of the agreements between the parties, in particular the Agreement of 1939.

Some of the testimony, especially by PTC's President and by its Comptroller, concerned PTC's future. But most of the testimony was accounting testimony that focused upon the manner in which PTC's pension obligation was disclosed. Three independent certified public accountants testified: James W. Clark of Price, Waterhouse & Co. for SEPTA and the City; and Ralph E. Lee, Jr., of Arthur

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* Exhibit P-28, exhibit P.

** Exhibit P-28, exhibits A-O.

Anderson & Co., and John L. Moneta of Lybrand, Ross Brothers & Montgomery for PTC.

Mr. Clark testified that a vested pension liability must be shown on the liability side of the balance sheet in order to fulfill the standards of minimum accounting principles. Mr. Clark interpreted the Addendum on Accounting Principles for Regulated Industries to the Accounting Principles Board's Opinion of December, 1962, to mean that the generally accepted accounting principle of disclosing vested pension obligations as a liability on the balance sheet was applicable to a regulated industry. The addendum, according to Mr. Clark, would allow a regulated business to set up a deferred charge (asset) where the cost incurred was treated for rate base purposes by the regulatory authority as applicable to future revenues provided the company was sure it could recover the costs out of future revenues. In Mr. Clark's opinion the economic future of PTC was bleak and cast doubt on its ability to recover such costs in the future, and therefore he concluded that PTC was not within acceptable accounting principles if it established an asset for the deferred charge. Without the asset the effect of creating a $17,000,000 pension reserve would be to eliminate any profit for the year and, further, to wipe out retained earnings and capital surplus, leaving a corporate deficit.

Messrs. Moneta and Lee agreed that it would be preferable to carry the vested pension liability on the balance sheet instead of in a footnote. However, they would automatically offset it with a counter-balancing asset. In their opinion, to state it generally, the test of recovering the cost in the future set forth in the addendum would be met if the company could meet its pension payments in the future as it had in the past. The net result would be no change in surplus. Since there was no change in surplus, disclosure

in a footnote instead of on the face of the balance sheet did not, in their opinion, constitute improper accounting procedure. They testified that since the practice of the company of providing for pensions on a pay-as-you-go basis and disclosing the actuarily determined amount of the obligation in a footnote was a long and consistent one, it was an acceptable accounting method. Furthermore, in their opinion, an abrupt change in the accounting system without a change in the manner of providing for pensions would unnecessarily distort the income statement for the year of the change and thus distort the picture of the company's income pattern for possible investors.

The arguments can be summarized as follows:

SEPTA argued:

1. PTC's accounting for pensions is wrong.

2. PTC must carry the obligation as a liability.

3. Because of the bleak economic future facing PTC, no offsetting asset can be placed on the books.

4. The result of placing such a liability on the books would be to wipe out all surplus.

5. If there are no retained earnings, there is no fund out of which cash dividends could be declared.

6. If there is no fund out of which cash dividends can be declared, there is no undistributed corporate surplus.

7. If there is no undistributed corporate surplus, SEPTA pays only an amount equal to the funded debt plus $10 a share for the common stock in return for PTC's assets.

PTC argued (and for this purpose its argument assumed, as has now been held, that "undistributed corporate

surplus'' was not a valuation figure but a balance sheet figure):

1. The pay-as-you-go method of accounting for pension liabilities is a proper method where it has been used consistently over a long period of time.

2. Disclosing the pension obligation in a footnote is the same as disclosing it in the balance sheet as a liability with an offsetting asset, because:

a) An offsetting asset would exist if the pension liability were carried on the balance sheet because the Public Utility Commission has shown no disinclination to include pension payments in the amount calculated for the rate base, and

b) PTC believes its future is good enough to warrant prediction that it will recover its pension costs in the future as it has recovered them in the past.

3. Therefore PTC considers that it does have a fund available for cash dividends (retained earnings), which SEPTA must pay for under the formula.

The difficulty with this extended testimony, as with the arguments based upon it, is that it is irrelevant in that it is beyond the scope of this action. This is a petition for a declaratory judgment. The judgment will declare whether the various agreements and the assignment under which SEPTA is acting are valid, and if they are, what is the meaning of the formula stated in the Agreement of 1939. The judgment will accordingly declare what is the meaning of ''undistributed corporate surplus'' as one factor of the formula. As has been discussed, the declaration will be that as applied to PTC's present balance sheet, ''undistributed corporate surplus'' means PTC's ''Retained Earnings''. But there will be no finding incident to this declara-

tion with respect to whether the particular dollar figure shown on PTC's books as the amount of "Retained Earnings" is a correct figure. Such a finding might be appropriate, if supported by the evidence, in an action to enjoin PTC from declaring a dividend, which would have to be paid from PTC's "Retained Earnings" account. It is not appropriate here.

In this connection it is in order to recall what this Court said in its opinion dismissing PTC's answer raising questions of law concerning jurisdiction, *aff'd* 419 Pa. 471 (1965).

One of PTC's arguments that the Court did not have jurisdiction was that a declaratory judgment should not be granted when there is or might be a dispute of facts. In rejecting this argument the Court made three observations:

> 1. So far as the validity of the City's right of purchase, and the assignment of the right, and the meaning of the formula, were concerned, it did not appear from the City's and SEPTA's pleading that there was any dispute as to the facts.
>
> 2. The Court recognized that at the trial the City and SEPTA "intend[ed] to present expert accounting testimony that reasonable and proper accounting practice would be to move the figures in footnote 9 [the pension obligation footnote] into the balance sheet so as to reduce (eliminate) surplus" (page 41 of the Court's opinion). But the Court said as to this (page 42):
>
> > ". . . it may be that no such accounting testimony as the City and SEPTA say they will offer will be admissible. At least one preliminary question will be whether the agreement of 1907 does not permit PTC to state its books as it sees fit (so long as no fraud is involved). Should this be the

case, there will not even be a question of accounting theory, much less any question of fact."

3. The Court concluded by saying (page 42):

"... should the Court permit expert testimony as to accounting theory, still there might be no factual issues involved. The witnesses might accept, and require as a factual basis only, the Company's balance sheet and accompanying notes."

It is now apparent that the trial developed in accordance with the first of these observations. There is no dispute regarding the existence of the various agreements and of the assignment; the only disputes are legal disputes regarding the validity and meaning of these documents; and all of the questions raised by the parties may be answered as a matter of law by an examination of the documents.

At the trial the Court did permit accounting testimony, for it wished to give all parties a full day in Court. It is most desirable that this litigation be resolved, one way or another, once and for all; it is most probable that this Court's decree will be appealed to the Supreme Court; and this Court wished to be sure that the Supreme Court had a record so full that it could decide finally upon all of the parties' respective, numerous contentions. Nevertheless, this Court has not found, and it does not anticipate that the Supreme Court will find, the accounting and other financial testimony helpful. For as has been stated the answers to all of the questions raised by the parties may be declared by an examination of the pertinent documents; there is no need to resort to any of the accounting and other financial testimony.

It may be observed in passing that if there were need to resort to the financial and accounting testimony, factual issues might arise. *E.g.*, it might be necessary to decide

whether PTC's future is bleak or bright. The Supreme Court has held that in an extraordinary case, a declaratory judgment proceeding may resolve factual issues. *Stevenson, Appellant. v. Stein,* 412 Pa. 478 (1963). For many reasons, this is an extraordinary case, and perhaps it would be appropriate to resolve such factual issues. However, this point need not be decided, since there are no factual issues that are pertinent.*

It has already been seen that examination of the pertinent agreements is sufficient to dispose of the arguments that the Agreements of 1907 and 1939 violate the rule against perpetuities; that the Agreement of 1957, 1962, and 1965 are pertinent; that the assignment by the City to SEPTA in 1965 was invalid; and that "undistributed corporate surplus" is a valuation figure rather than PTC's balance sheet statement of "Retained Earnings". It is equally true that an examination of the agreements, in particular the Agreements of 1907 and 1939, is sufficient to dispose of the question now being considered, *i.e.,* whether PTC's pension obligation may be charged against PTC's retained earnings.

Section Eleventh of the Agreement of 1907 provided that for a price equal to the par value of PRT's stock the City or its assignee could acquire "all the property, leaseholds and franchises of the Company, subject to all indebtedness now existing or hereafter lawfully created hereunder upon July 1st, 1957. . . . ."** This was changed by the Agreement of 1939, so that the City or its assignee, upon payment of the formula price provided in that Agreement, would acquire "all the property, leaseholds, and franchises

* It may be suggested that intervenors' claim of "fraud, accident or mistake" raises factual issues. But it does not. First, as has been seen, the claim is relevant only on the legal premise that the City's option had an expiration date, which it did not; and second, accepting all of the testimony of intervenors' witnesses, as has also been seen, the claim was not proved as a matter of law.

** Exhibit P-1.

of the Company and its wholly owned subsidiaries upon any first day of July thereafter . . . ."* The clause "subject to all indebtedness . . . [etc.]" was eliminated. It follows, therefore, that if SEPTA pays the formula price, it acquires PTC's assets not subject to PTC's obligations, *i.e.*, that SEPTA after the acquisition will not be subject to PTC's pension obligation, which is only another way of saying that SEPTA may not refuse to pay the full formula price by charging against it PTC's pension obligation as though SEPTA would be subject to it.

The formula does not mean that as a matter of purchase settlement mechanics SEPTA and PTC may not agree that SEPTA will assume some of PTC's liabilities. For example, if before the purchase date PTC pays its current liabilities, it will have that much less cash that SEPTA will acquire upon purchase; the parties might agree that instead SEPTA will take all of the cash but will pay the current liabilities. However, in the absence of any such agreement, PTC remains responsible for its liabilities, including its pension obligations, and presumably will have to provide for their payment.

Another way of stating this conclusion is this: PTC chose to keep its books as it did, and to provide for a pension plan on a pay-as-you-go basis. There was no fraud or deceit—either alleged or proved—in the way PTC kept its books. The essence of the formula price, as had been seen, is that it is a book price. SEPTA is therefore bound to accept PTC's books in computing the formula price.

SEPTA is not, however, bound to keep its books as PTC kept its books. Nor can PTC require SEPTA to maintain a pay-as-you-go pension plan because PTC did. PTC seems to overlook this fact, for it asks the Court to conclude that SEPTA must not only pay for PTC's re-

* Exhibit P-6.

tained earnings (which is correct) but must also assume PTC's pension obligations. This is a self-contradictory request. SEPTA can only be required to do one or the other, as the formula provides. Under the Agreement of 1907 SEPTA would have had to assume the pension obligation as one of PTC's liabilities; under the Agreement of 1939 it does not have to. No doubt SEPTA will have to make some pension arrangement with its employees. But as to those PTC employees who have already retired, the responsibility is PTC's.

4. *Should SEPTA have to pay PTC's cost of financing and organization expenses, and the penalty interest on PTC's mortgages?*

a) *PTC's cost of financing and organization expenses.*

The last sentence of Section Eleventh of the Agreement of 1907 reads:

> "The Company reserves its franchise to be a corporation with the power to operate passenger railway systems and may become a bidder for such right.*

By Section 1(d) of the Agreement of 1939 this was amended only to change "railway" to "transportation" and "rights" to "right."**

SEPTA argues that since PTC will retain its corporate charter, SEPTA should not be required to pay for an asset on PTC's books for "organization expenditures and cost of financing."

If the history of the reorganization and the 1939 agreement explains anything, it explains that the option price was intended to be a single price for all of the leases, fran-

* Exhibit P-1.

** Exhibit P-6.

chises, and assets of PTC. The elements in the formula are not tied to particular assets on the books of PTC, and there is no way to apportion the option price among the various assets since the formula provides a special price for all of the assets taken together. SEPTA cannot pick and choose between the assets it wishes to pay for and those it does not. It must pay the full formula price whether it takes some or all of the assets. While it is true that SEPTA will have its own organization and financing costs to amortize, that does not lessen the amount that SEPTA must pay for the assets of PTC. Presumably on SEPTA's books the assets it does take will, as a group, be carried at a book figure equal to the option price it pays.

b) *Penalty interest.*

SEPTA argues that it should not have to pay PTC $39,622 for the penalty interest on the mortgage of the Hill Top Land Company, which penalty interest becomes due if the mortgage is paid off before the end of the calendar year, because SEPTA believes it is PTC's obligation to wait until the end of the calendar year to pay off the mortgage in order to avoid the penalty.

The first factor of the formula price includes the "accrued interest of . . . then outstanding . . . mortgages . . . ."* If PTC wishes to use the formula payment to retire outstanding mortgages as of the payment date, it should be able to, for it is not obliged to remain in business, although it may. Therefore, "accrued interest" will be held to include "penalty interest" if a penalty is imposed for early payment. However, SEPTA should only have to bear the cost of the penalty interest if PTC is called upon to pay the penalty. It would be unfair to allow PTC to recover the penalty interest amount if PTC were able to wait until the

* Exhibit P-6.

end of the year to pay the mortgage, and thus profit by the $39,622. It would seem reasonable for counsel to work out an escrow arrangement as to the $39,622 whereby SEPTA would pay PTC the amount only in the event that PTC is called upon to pay the same amount in penalty interest.

G. *Should the date when SEPTA must pay PTC be extended? (Questions Presented, Question No. 5.)*

In its notice of intent to exercise the right of purchase(*) SEPTA fixed July 1, 1966, as the date when it would pay PTC in accordance with the formula stated in the Agreement of 1907, as amended. When SEPTA's directors and PTC's directors agreed to settle this litigation, after negotiations in December of 1965 and January of 1966, the payment date was extended to January 1, 1967. By a vote finally counted on May 2, 1966, PTC's shareholders rejected the settlement. Thus, about six months were consumed in an effort to settle the case, and further time has been, and will be, consumed by this litigation.

At the trial SEPTA presented evidence apparently intended to prove that one of PTC's directors, Edward H. Ellis, Jr., had promised to work for shareholder approval of the settlement but had voted against it, and, further, was the agent of a principal shareholder, Joseph L. O'Brien, who, with members of his family, also voted against the settlement and persuaded other shareholders to vote against it. This evidence, in SEPTA's view, supports an extension of the payment date. Opposing counsel argues that the evidence does not show that Mr. Ellis was Mr. O'Brien's agent, or that Mr. O'Brien acted improperly.

It is unnecessary to make findings on any of these contentions. It is unquestioned that the settlement negotiations between PTC's and SEPTA's representatives were

(*) Exhibit P-23.

conducted in good faith, and that the time consumed by them was reasonable. It was the privilege of PTC's shareholders to reject the settlement that a majority of PTC's directors recommended, but it would be most inequitable to penalize SEPTA because of the delay that ensued while the settlement was reduced to writing, submitted to the shareholders, and voted upon by the shareholders.

In the opinion of this Court on PTC's answer raising questions of jurisdiction, *aff'd* 419 Pa. 471 (1965), it was noted that SEPTA must issue and sell its bonds, if it is to be able to raise the money it will need to pay PTC. No bond issue can be expected to be successful while litigation rages regarding its validity. And all bond issues take time. This Court's decree may be appealed and no doubt will be. Even if the appeal should be disposed of by late this year, SEPTA would be left with insufficient time to issue its bonds and raise the money needed to pay PTC by January 1, 1967. PTC then might be able to assert that SEPTA had defaulted in its obligation.

In spite of these facts PTC has asked the Court to conclude that "SEPTA must exercise the claimed purchase option, if at all, by making settlement on January 1, 1967".* Thereby PTC asks the Court to impose upon SEPTA conditions that PTC by filing exceptions and an appeal can make sure SEPTA will be unable to meet. The Court will make no such conclusion. To do so would stultify the Court. It would amount to holding that PTC is obliged to sell to SEPTA, but then decreeing that it need not sell.

Therefore, the decree nisi will provide that SEPTA's payment shall not be required until a reasonable time has elapsed, which shall be ~~not~~ less than six months (*i.e.*, the time consumed by the unsuccessful settlement effort), after this case has been finally disposed of without the possibility of further appeal.

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* PTC's Requested Conclusion of Law, No. 26.

Such a decree is within the power of the Court. See Sections 1 and 8 of the Uniform Declaratory Judgments Act, Act of June 18, 1923, P.L. 840, 12 PS §831, 838: "The declaration may be either affirmative or negative in form and effect . . . ."; "Further relief . . . may be granted whenever necessary or proper."; *West v. Peoples First Nat. Bk. & Tr. Co.*, 79 D. & C. 275, 279 (1951), *aff'd* 378 Pa. 275 (1954).

Conclusion

Since 1907 it has been provided that ". . . there shall be stamped across the face of all certificates of stock and leases held by the Company, notice that the same are held subject to the terms of this agreement . . . ."* The questions now before the Court are whether "this agreement", as it has been amended, and assigned to SEPTA, is valid, and if so, what it means. These questions are questions of law, and they have been answered.

Roscoe Pound once said,

> "It is a presupposition of the whole economic order that promises will be kept. Indeed, the matter goes deeper. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item."**

PTC must keep its promise, first made in the Agreement of 1907, and made again in the Agreement of 1939, to sell its assets to the City or the City's assignee.

Therefore, the Court makes the following findings of fact and conclusions of law, and enters the following decree nisi:

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* Section First of the Agreement of 1907, Exhibit P-1, continued in effect by Section 4 of the Agreement of 1939, Exhibit P-6.

** Pound, "Individual Interests of Substance-Premised Advantages", 59 Harv. L. Rev. 1-2 (1945), footnotes omitted.

Findings of Fact

The following facts are either stipulated, admitted, undisputed, or subject to judicial notice.

1. The parties to the action are as follows:

a) Plaintiff Southeastern Pennsylvania Transportation Authority (SEPTA), is a body corporate and politic formed under the Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P.L. 984, 66 PS §2001, *et seq.* SEPTA's principal office and place of business is in Philadelphia.

b) Plaintiff City of Philadelphia is a city of the first class organized and existing under the laws of the Commonwealth of Pennsylvania.

c) Defendant Philadelphia Transportation Company (PTC) is a corporation and a public utility company organized under the laws of the Commonwealth of Pennsylvania. It is the successor to Philadelphia Rapid Transit Company (PRT). Defendants Philadelphia Market Street Subway-Elevated Railway Company, Motor Real Estate Company, Hill Top Land Company, and Trenton-Philadelphia Coach Company, are corporations organized under the laws of the Commonwealth of Pennsylvania, and each is a wholly-owned subsidiary of PTC. Each defendant's principal office and place of business is in Philadelphia. The action has been discontinued as to PTC Trucking Rental Company (the remaining defendant named in the caption).

d) Intervening defendants are the following persons, who own a total of 24,333 of PTC common stock: Joseph N. Janney, E. Griggs Adams, Stanley E. Dannecker, W. Wright and Elizabeth B. Humphreys, Thomas A. Marston, H. Melvin Powell, Carl Schmieg, and Charles F. and Janice F. Trouts.

2. An Ordinance of the City of Philadelphia enacted on July 7, 1857, provided that "all Railroad Companies . . . shall be at the entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street, avenue or alley occupied by them", and that each company had to "file a detailed statement . . . of the entire cost of the same; and the City of Philadelphia reserves the right at any time to purchase the same, by paying the original cost of said road or roads, and cars at fair valuation." (See Exhibit P-4, which is a copy of the entire ordinance.)

3. From 1858 to 1874 some eighteen street railway companies, which came to be known as "the underliers", were chartered. They acquired perpetual franchises to use the City streets, subject, however, to the Ordinance of 1857. (See pages 55a-56a, *supra*.)

4. In 1883 the Legislature authorized the formation of traction companies, which did not have the power to build or own street railway companies but did have the power to lease, maintain, improve, and operate them. By 1902 the underliers' franchises had been leased in a pyramid of leases that may generally be described as follows: Almost all of the franchises were leased by the Philadelphia Traction Company, the Electric Traction Company, or the Peoples Traction Company; these companies' leases were in turn leased by the Union Traction Company; in 1902 the Philadelphia Rapid Transit Company (PRT), was formed, and it leased the leases of the Union Traction Company. (See pages 56a-57a, *supra*.)

5. Typically, the leases were for 999 years. ". . . it was provided that the lessee company should carry out the terms and conditions of the preceding leases, for which its lessors were responsible. Those contracts provided for

specified rentals to be paid by the lessee to the lessor, sufficient to cover the fixed charges of the latter and a stated dividend to its stockholders; and, since the leases included the franchises of the original companies, the latter were denuded of everything except their mere corporate existence." (See pages 57a-58a, *supra;* the quotation is from *Citizens Passenger Ry. Co. v. Pub. Ser. Com.,* there cited.)

6. By Act of April 15, 1907, the Legislature authorized the City to enter into contracts with "any street passenger railway company, surface, elevated or underground, or motor power company leasing and operating the franchises and property of such company," which contracts could "provide for the ultimate acquisition by the [City] . . . of the leaseholds, property and franchises of the contracting companies." (See Exhibit P-3, which is a copy of the act.)

7. Pursuant to the Act of April 15, 1907, an ordinance of the City of Philadelphia was enacted on July 1, 1907, that authorized the Mayor to enter into such a contract with PRT. (See Exhibit P-2, a copy of the ordinance.)

8. Pursuant to the Act of April 15, 1907, and the Ordinance of July 1, 1907, the City on July 1, 1907, did enter into such a contract with PRT. (This Agreement of 1907 is copied as Exhibit P-1.)

9. The Ordinance of July 1, 1907, repealed the Ordinance of 1857, and by the repeal and by the Agreement of 1907 the City gave up its "right at any time" to acquire the underliers' perpetual franchises. In return the City secured the right to participate in various ways in the management of PRT, and to receive certain payments from PRT, all as more fully stated in the Agreement of 1907. Further, Section Eleventh of the Agreement of 1907 provided that

> "The City reserves the right to purchase all the property, leaseholds and franchises of the Company [*i.e.*, PRT], subject to all indebtedness . . . upon July 1st, 1957, or upon the first day of any July thereafter by serving six months' notice . . . [for] an amount equal to par for its capital stock then outstanding, to wit: the thirty million (30,000,000) dollars of capital stock now authorized plus any additional capital stock issued with the consent of the City hereunder . . . ."

Since PRT did not own but only leased the underliers' franchises, the net effect of the Agreement of 1907 was that the City gave up its right to acquire the underliers' franchises in return for the right to buy the assets of PRT, that is, to replace PRT as the tip of the pyramid of lessees who guaranteed the underliers' rentals. (See pages 58a-63a, *supra*.)

10. One purpose of the Agreement of 1907 was to stimulate private and municipal investment in the improvement of the transit system. Accordingly, between 1912 and the 1930's the City spent some $15,000,000 on the Frankford Elevated, some $15,000,000 on the Market Street Elevated, and some $125,000,000 on the Broad Street subway. Despite such efforts by the City, and PRT's private efforts, PRT went into receivership, and as of December 31, 1938, PRT had a deficit of almost $19,000,000; its current liabilities included almost $29,000,000 due the underliers and traction companies. (See pages 63a-68a, *supra*.)

11. As the transit situation had worsened, various solutions to it were proposed and explored. One in particular, suggested in 1927 to the Public Service Commission of Pennsylvania by C. C. McChord, a former Chairman of the Interstate Commerce Commission, was to condemn the underliers. Enabling legislation was enacted, but in 1929

condemnation was abandoned when it appeared that to acquire the underliers' franchises the City might have to pay some $138,000,000. (See pages 68a-72a, *supra.*)

12. In September, 1939, Court-appointed directors for PRT petitioned Court of Common Pleas No. 1 for authority to file an original debtor's petition in the United States District Court under Section 77B of the Federal Bankruptcy Act. On December 4, 1934, PRT filed in the District Court its Original Plan of Reorganization. In the course of hearings before the District Court and the Public Utility Commission the Original Plan was superseded by the First Revised Plan, the Second Revised Plan, dated December 1, 1937, and then by the Second Revised Plan as amended on June 1, 1938, and finally on November 15, 1938. As amended on November 15, 1938, the Second Revised Plan is Exhibit P-8.

13. In general, the plan of reorganization was to free the new company, which was to be called the Philadelphia Transportation Company (PTC), from the burden of the underliers' guaranteed rentals by a consolidation and merger of the underliers, the traction companies, and PRT. By the consolidation and merger the underliers and traction companies would surrender their franchises and lesses to the new company, PTC. Thus the pyramid of leases, which had played a large part in producing the failure of PRT, would be removed. The consent of the underliers and traction companies to the reorganization was obtained by giving them a large share of the capitalization of PTC; but, in an effort to prevent them from being as unduly represented as they had been, and to encourage private investment in the common stock, the capitalization was successively reduced, from $174,000,000 as proposed in the Original Plan, to $133,000,000, then $100,000,000, and finally $85,000,000. (See pages 72a-76a, *supra.*)

14. It was further necessary to obtain the City's consent to the reorganization. This was obtained after public hearings before the Committee on Transportation and Public Utilities of the Philadelphia City Council in April and May of 1939. The consent took the form of an agreement amending the Agreement of 1907. This amending agreement was authorized by Ordinance of May 20, 1939 (copied as Exhibit P-7), and was executed on June 12, 1939 (the Agreement of 1939 is copied as P-6). (See pages 76a-79a, *supra.*)

15. Section 1(d) of the Agreement of 1939 amended Section Eleventh of the Agreement of 1907. As amended, Section Eleventh provided:

> "Eleventh. The City reserves the right to purchase all the property, leaseholds and franchises of the Company [*i.e.*, PTC] and its wholly-owned subsidiaries upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company. The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its

wholly-owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: *Provided, however,* That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised the City shall succeed to and become the owner of all the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly owned subsidiaries and the City may either operate the same or lease the right to operate the same for such terms and upon such conditions as it may deem fit. The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchises to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right."

16. Thus, the Agreement of 1939 made five major changes in the City's right to purchase as that right had been provided in the Agreement of 1907:

(1) Because of the reorganization, if the City exercised its right to purchase, it would acquire the leases and franchises not only of PRT but also of the underliers and traction companies. Thus the City regained, in different form, what it had had under the Ordinance of 1857 but had surrendered by the Ordinance and Agreement of 1907.

(2) The right to purchase was changed from a right to purchase PRT's assets "subject to all indebtedness" to a right to purchase PTC's assets free and clear.

(3) The time when the City could exercise its right to purchase was accelerated from July 1, 1957, or any July 1 thereafter, to any July 1 after 1939.

(4) The price that the City would have to pay was changed from the par value of PRT's outstanding capital stock to a price made up of four factors: the amount of PTC's outstanding bonds, mortgages, and ground rents; the par value of PTC's outstanding preferred stock; $10 for each share of PTC's outstanding common stock; and the amount of PTC's undistributed corporate surplus, if any.

(5) The City reserved its right of condemnation. (See pages 80a-85a, *supra;* at 80a-82a the texts of the two versions of Section Eleventh are superimposed for easy comparison.)

17. The City and PRT or PTC further entered into the following agreements:

(1) Agreement of December 20, 1932, authorized by Ordinance of December 17, 1932 (copied as Exhibit P-5);

(2) Agreement of October 26, 1950 (copied as Exhibit P-9), authorized by Ordinance of September 20, 1950 (copied as Exhibit P-11).

(3) Agreement as of July 1, 1957 (copied as Exhibit P-12), authorized by Ordinance of August 2, 1957 (copied as Exhibit P-14);

(4) Agreement as of July 5, 1962 (copied as Exhibit P-15), authorized by Ordinance of July 5, 1962 (copied as Exhibit P-17); and

(5) Agreement as of February 25, 1965 (copied as Exhibit P-18), authorized by Ordinance of January 6, 1965 (copied as Exhibit P-20).

18. On June 8, 1965, the City by an Assignment Agreement (copied as Exhibit P-22), which was authorized by an Ordinance of June 4, 1965 (copied as Exhibit P-21), assigned its reserved right of purchase to SEPTA.

19. This assignment to SEPTA was without notice to PTC and without public auction.

20. On June 8, 1965, SEPTA gave PTC notice that SEPTA as assignee of the City intended to purchase all the property, leaseholds and franchises of PTC and its wholly-owned subsidiaries on July 1, 1966, pursuant to the reserved right of purchase contained in Section Eleventh of the Agreement of 1907, as amended by Agreement of 1939. (The notice is copied as Exhibit P-23.)

21. PTC does not have any preferred stock outstanding. (See Exhibit D-44.)

22. PTC's surplus account consists of "Capital Surplus" and "Retained Earnings." (See Exhibit D-44.)

23. PTC has a vested obligation to pay pensions to retired PTC employees. As of December 31, 1965, it was estimated, on the basis of actuarial studies, that the approximate amounts required to fund the past service costs for those already retired would be $11,938,392 for pensioners who had been nonsupervisory employees, and $4,973,304 for pensioners who had been supervisory employees, officers, or other executive personnel. (See Exhibit P-28, exhibit P.)

24. Since June 8, 1965, when SEPTA exercised the right to purchase, as aforesaid, certain delays have ensued as follows:

(1) When PTC resisted SEPTA's exercise of the right to purchase, SEPTA and the City on June 18, 1965, brought the present declaratory judgment action. On July 6, 1965, PTC filed an answer raising questions of law concerning jurisdiction. This was dismissed by this Court on August 27, 1965, and the Supreme Court affirmed on November 29, 1965. *S.E. Trans. Auth. v. Phila. Trans. Co.*, 419 Pa. 471 (1965).

(2) Incident to its exercises of the right to purchase, SEPTA brought an action in mandamus to require PTC to permit SEPTA to examine PTC's records. PTC filed preliminary objections, which this Court dismissed in *SEPTA v. PTC*, 38 D. & C. 2d 653 (1965).

(3) Commencing in December, 1965, representatives of SEPTA, the City, and PTC entered into settlement negotiations. These resulted in an agreement that was submitted to PTC's shareholders in April of 1966. By a vote finally counted on May 2, 1966, PTC's shareholders rejected the settlement.

25. SEPTA, to raise the money that it will need to make payment under its exercise of the right to purchase, will need a reasonable time to issue and sell its bonds. It has not practically been able to do so during this litigation.

CONCLUSIONS OF LAW

1. Under the Agreement of 1907, as amended by the Agreement of 1939, the City's reserved right of purchase did not have an expiration date. (See pages 85a-87a, *supra.*)

2. The Agreements of 1957, 1962, and 1965 did not impose an expiration date upon the City's reserved right of purchase. (See pages 87a-92a, *supra.*)

3. The City's reserved right of purchase did not violate the common law rule against perpetuities. (See pages 92a-105a, *supra.*)

4. The Agreement of 1957 was a "conveyance" within Section 1 of the Estates Act of 1947, Act of April 24, 1947, P.L. 100, 20 PS §301.1, and therefore in any case the City's reserved right of purchase is not an interest void as a perpetuity because it was exercised within the time allowed by Section 4 of the Estates Act, 20 PS §301.4. (See pages 106a-119a, *supra.*)

5. In view of the foregoing, in particular Conclusion of Law No. 2, PTC's arguments regarding the validity and effect of the Agreements of 1962 and 1965, and the time when the right to purchase was exercised by SEPTA, need not be considered. (See pages 120a-121a, *supra.*)

6. It is for the same reason unnecessary to consider the intervenors' arguments that the Agreement of 1965 was procured by "fraud, accident or mistake." However, the Court has, under the special circumstances of the case, considered intervenors' arguments, and, accepting the testimony of the witnesses called by intervenors, the Court concludes that no fraud, or accident, or mistake was shown. (See pages 121a-135a, *supra.*)

7. The City's assignment of its reserved right of purchase to SEPTA was valid and in accordance with the provisions of the Agreement of 1907, as amended by the Agreement of 1939. The City was not required by the Home Rule Charter to make the assignment only after public auction and to the highest bidder. (See pages 135a-144a, *supra.*)

8. SEPTA's exercise of the assigned right of purchase was valid. (See Conclusion of Law No. 5.)

9. Pursuant to its exercise of the right to purchase, SEPTA must pay PTC an amount made up of the four amounts specified in Section Eleventh of the Agreement of 1907, as amended by the Agreement of 1939, which shall be determined from PTC's balance sheet as of the payment date. (See Finding of Fact No. 15 for the full statement of the four different amounts.)

10. The fourth of the aforesaid amounts, "the amount of the then undistributed corporate surplus, if any, of Company", means, as applied to PTC's present balance sheet, PTC's "Retained Earnings." (See pages 144a-163a, *supra.*)

11. PTC's obligation to its retired employees is a vested obligation or liability. (This was stipulated.)

12. In computing PTC's "undistributed corporate surplus" as one of the amounts SEPTA must pay, no account is to be taken of PTC's pension obligation to its retired employees. SEPTA is entitled to acquire PTC's assets free of that obligation, which after the acquisition will remain PTC's obligation, for except as SEPTA may agree otherwise, PTC is responsible for its outstanding liabilities. (See pages 163a-172a, *supra.*)

13. In making payment pursuant to its exercise of the right to purchase, SEPTA may not diminish the amount of its payment by PTC's cost of financing and organization expenses. (See pages 172a-173a, *supra.*)

14. In making payment for "accrued interest", as part of the first of the four amounts specified in Section Eleventh of the Agreement of 1907, as amended by the Agreement of 1939, SEPTA must pay PTC enough to compensate PTC for any prepayment penalties PTC is called upon to pay if PTC retires its mortgage debt before maturity date. (See pages 173a-174a, *supra.*)

15. SEPTA is not obliged to make payment pursuant to its exercise of the right to purchase until a reasonable time, which shall be not less than six months, after this case has been finally disposed of without the possibility of further appeal. (See pages 174a-176a, *supra.*)

DECREE NISI

And Now, July 14, 1966, for the reasons stated in the foregoing opinion, it is declared:

1. The City's reserved right of purchase as provided in the Agreement of 1907, as amended, is valid.

2. The City's assignment to SEPTA of its reserved right of purchase is valid, and SEPTA may exercise the right.

3. In making payment to PTC pursuant to the exercise of the right, SEPTA shall pay an amount made up of the following amounts, which shall be determined from PTC's balance sheet as of the payment date:

(1) an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, PTC and its wholly owned subsidiaries;

(2) an amount equal to ten dollars per share for all then outstanding common stock of PTC; and

(3) the amount of the then "Retained Earnings" of PTC.

4. SEPTA shall have a reasonable time, after this litigation has been finally disposed of without the possibility of further appeal, to make the foregoing payment. "Reasonable time" means at least six months.

5. Any party may file exceptions within 20 days. If no exceptions are filed, or if exceptions are waived, the decree nisi shall be entered by the Prothonotary, upon praecipe, as the final decree.

SPAETH, *J.*

Filed: July 14, 1966.

APPENDIX E.

Opinion of the Court of Common Pleas en banc.

Defendant Philadelphia Transportation Company (PTC) and intervening defendants (who are minority stockholders of PTC) filed exceptions to the adjudication and decree nisi handed down by Spaeth, J., as trial judge on July 14, 1966. Argument on the exceptions was heard by this Court en banc on August 24, 1966. The day before the argument the Transport Workers Union of America and Transport Workers Union of Philadelphia, Local No. 234, had filed a petition asking to be allowed to intervene as defendants. At the argument the Court noted the petition but deferred ruling on it until answers were filed and argument on the petition and answers was heard.

The exceptions to the adjudication and decree nisi have been considered and found to be without merit. They will be dismissed for the reasons stated in the opinion of the trial judge, and the decree nisi will be made final.

The Union's petition avers that it was filed to protect the pension rights of the Union members, which, it is also averred, were "severely jeopardized" by the decree nisi. The Unions' petition does not object to the adjudication or decree nisi of the trial judge that the Agreement of 1907 as amended is valid and that PTC must sell its assets to SEPTA at the price fixed by the formula in that Agreement as construed by the trial judge. Rather, the Unions' petition objects to the decree nisi only so far as it relates to pensions, and the petition asks that a provision be included in the final decree either that all pension obligations shall be assumed by the Southeastern Pennsylvania Transportation

Authority (SEPTA), or, in the alternative, the SEPTA and PTC shall set up a trust fund to provide for the pensions. PTC in its answer to the petition does not object to the Unions being admitted as defendants; it asks that the decree nisi be reversed and that the final decree provide that SEPTA must assume the pension obligation; and it objects to the Unions' request that PTC be made to contribute to a trust fund. SEPTA in its answer states its belief that the Unions have no standing to intervene because, admitting the factual averments of the Unions' petition, their members' pension rights are fully protected under the decree nisi. However, SEPTA does not object to a provision in the final decree that a trust fund be set up by PTC out of the purchase price paid by SEPTA. The City's answer is substantially like SEPTA's except the City apparently envisions continuing jurisdiction, for it says that it "believes that as a matter of supplemental relief herein at the appropriate time the Court should issue an order finding that immediately upon settlement with SEPTA, PTC must fund its indebtedness to pensioners then on pension in a manner to be approved by the Court." The minority stockholders did not answer the Unions' petition. Argument on the petition and answers was heard by this Court en banc on September 12, 1966.

The Court is in sympathy with the Unions' desire to protect its members' pension rights. However, the Court can see no reason why the Unions should be permitted to intervene in this action, for the adjudication and decree nisi, here affirmed, are as favorable as the Unions could reasonably hope to receive, and nothing in the adjudication and decree of the trial judge or of this Court is in any way prejudicial to the rights of the Unions or their members. Indeed, the Unions' petition appears to overlook the trial judge's finding that "PTC has a vested obligation to pay

pensions to retired PTC employees" (Finding of Fact No. 23), and his conclusion that this obligation will remain PTC's even after SEPTA acquires PTC's assets (Conclusion of Law No. 12). Thus, not only is there no "jeopardy" to the rights of retired employees as a result of the trial judge's adjudication and decree, but PTC is required to provide for the payment of retired employees' pensions before it may distribute the money that will be received from SEPTA when SEPTA purchases PTC's assets. And see: *Pierce v. United States,* 255 U. S. 398, 403 (1921); *Heaney v. Riddle, Aplnt., et al.,* 343 Pa. 453, 456 (1942).

The Unions also appear to be troubled about the pension rights of PTC employees not yet retired. However, the only issues before this Court are whether under the Agreement of 1907 as amended SEPTA may buy PTC's assets, and if so, the basis for the determination of the price SEPTA must pay. As noted, the Unions do not question SEPTA's right to buy; and the price SEPTA must pay under the formula provided in the Agreement is not affected by pension rights of employees not yet retired.

If PTC refuses to meet its pension obligation, the Unions or their members may assert their rights without regard to this litigation and without prejudice from anything said by the trial judge or this Court.

The Unions' suggestion that the final decree provide "that SEPTA and PTC be required to create and finance a trust fund adequate, pursuant to sound actuarial principles, to meet all pension payments for the lifetimes of those employees who are on the pension rolls of PTC at the time of any takeover by SEPTA" is without merit. To follow the suggestion would give the Unions something that their counsel at oral argument conceded (see oral argument notes of testimony pages 3-4, 6-7, and 9-10) they are not presently entitled to under their agreement with PTC and would

thereby put the Union members in a preferred category with relation to other creditors of PTC.

Accordingly, the Court enters the following

ORDER.

And Now, September 16, 1966, the petition for leave to intervene filed by the Transport Workers Union of America and Transport Workers Union of Philadelphia, Local No. 234, is dismissed; the exceptions filed by defendants and intervening defendants to the trial judge's adjudication and decree nisi are dismissed; the opinion, findings of fact, and conclusions of law of the trial judge are approved; and the decree nisi is made final.

/s/ Sloane, *P. J.*,
/s/ Waters, *J.*,
/s/ Spaeth, *J.*

APPENDIX F.

Opinion of the Trial Judge in Support of Preliminary Injunction.

SPAETH, *J.*

I. Statement of the Pleadings and Issues.

On December 20, 1966, the Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia filed a petition for supplemental relief. On December 21 a rule was issued upon the Philadelphia Transportation Company (PTC) to show cause why relief should not be granted. On December 23 SEPTA and the City filed an amended petition. On December 28 PTC filed an answer to SEPTA's and the City's petition and amended petition. Testimony was taken on December 28 and 29. On December 30 argument was heard and a partial temporary restraining order, which will be discussed later, was issued.

This proceeding is the most recent incident of a declaratory judgment action now pending in the Supreme Court. The declaratory judgment action was started by SEPTA and the City on June 18, 1965, under the Uniform Declaratory Judgments Act, Act of June 18, 1923, P. L. 840, 12 PS § 831, *et seq.*, against PTC and its wholly-owned subsidiaries. SEPTA and the City sought a declaration whether SEPTA as the City's assignee had the right under certain agreements usually called the Agreement of 1907, as amended, to buy all of PTC's assets.

On July 6, 1965, PTC responded to SEPTA's and the City's petition for declaratory judgment with an answer raising questions of law concerning jurisdiction. On August 27 this Court by opinion and order dismissed the

answer. PTC appealed to the Supreme Court, which on November 29 affirmed: *S. E. Trans. Auth. v. Phila. Trans. Co.*, 419 Pa. 471 (1965) (per curiam).

On December 13, 1965, PTC filed its answer on the merits to the petition for declaratory judgment. After certain intermediate events that need not be recited now,* testimony was heard, starting on May 16, 1966, and extending through June 3. On July 14 this Court filed an opinion, findings of fact, conclusions of law, and a decree nisi. This Court declared that the Agreement of 1907, as amended, was valid and that under it SEPTA as the City's assignee was entitled to buy PTC's assets at a price to be determined according to a formula provided in the Agreement.

PTC and certain minority stockholders of PTC as intervening defendants filed exceptions, and the Transport Workers Union of America and Transport Workers Union of Philadelphia, Local No. 234, filed a petition for leave to intervene as defendants.

On August 24, 1966, the Court en banc, Sloane, P. J., Waters, J., and Spaeth, J., heard argument on the exceptions, and on September 12 it heard argument on the Unions' petition for leave to intervene. By opinion and order of September 16 the Court en banc dismissed the exceptions, approved the opinion, findings of fact, and conclusions of law filed by the Trial Judge, made the decree nisi final, and dismissed the Unions' petition for leave to intervene.

On December 12, 1966, PTC appealed to the Supreme Court (No. 188 of the January Term, 1967), and on December 13 so did the minority stockholders (No. 194 of the January Term, 1967). Neither PTC nor the minority stockholders requested a supersedeas, nor have they been

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* They were recited on pages 2-4 of the opinion filed by this Court on July 14, 1966.

granted one. The Unions, meanwhile, filed an appeal to the Supreme Court (No. 190 of the January Term, 1967) and also a petition to intervene as party appellant in PTC's appeal (No. 188). On December 19 PTC answered the Unions' petition. Also on December 19 the record of the proceedings before this Court and the Court en banc was filed with the Supreme Court. On December 20 the Supreme Court denied the Unions' petition to intervene but granted them leave to file a brief as *amici curiae*. Also on December 20, on petition by SEPTA and the City, the Supreme Court advanced the date for argument on PTC's and the minority stockholders' appeals from April 17 to March 14, 1967.

Generally speaking, there are two questions before this Court. The first question is: Does this Court retain any jurisdiction in view of the appeals to the Supreme Court? If the answer is that it does, the second question is: Is the relief requested by SEPTA and the City such as the Court may grant?

The relief requested by SEPTA and the City is a preliminary injunction restraining PTC from (1) paying a dividend; (2) engaging in negotiations looking to a merger of PTC with the Philadelphia Suburban Transportation Company (Red Arrow) or any other transit company; (3) starting an action in the United States District Court challenging the validity of the Agreement of 1907, as amended; and (4) generally, from taking any other action in derogation of the Agreement of 1907, as amended, or with respect to PTC's assets other than in the ordinary course of business. It is the position of SEPTA and the City that this relief is supplemental to the appeals pending before the Supreme Court because, if the relief is granted, it will not affect the subject matter of the appeals but rather preserve the status quo, and if the relief is not granted, the status

quo will be destroyed, and thereby the integrity of the decree nisi of this Court, affirmed and made final by the decree of the Court en banc, and hence the integrity of the appellate process, will also be destroyed. Whether this position is sound will become apparent from the findings of fact.

II. Findings of Fact.

It is important to note that each of the following findings of fact is based either upon a judicial record, or upon an admission in a pleading to the Supreme Court or to this Court, or upon a document the authenticity (although not the legal validity) of which is admitted, or upon testimony and other evidence that PTC has not contradicted. The findings, therefore, will recite facts that cannot be, or at lease have not been, disputed.

The reason it is important to note that there is no dispute about the facts as this Court has found them is that PTC has persisted in arguing that the present proceeding is not within the Uniform Declaratory Judgments Act, *supra,* because a decision whether to grant the relief requested must depend upon resolving questions of fact. There is nothing to this argument; it amounts to an assertion that is not so.*

The findings follow:

1. The parties to this proceeding for supplemental relief are:

a) Petitioner SEPTA is a body corporate and politic under a certificate of incorporation issued by the Secretary

* There is nothing to the argument in any case. See *Phila. Mfrs. Mut. Fire Ins. Co. v. Rose,* 364 Pa. 15, 23-24 (1950), holding that after a declaration that a damaged building was covered by an insurance policy, the Court could in a supplementary proceeding determine damages (which would require the Court to resolve questions of fact).

of the Commonwealth, dated February 17, 1964, under the authority of the Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P. L. 984, 66 P. S. § 2001, *et seq.*, with the power and authority to acquire and operate transportation facilities in the five contiguous counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. SEPTA's principal office and place of business is in Philadelphia.

b) Petitioner City of Philadelphia is a city of the first class organized and existing under the laws of the Commonwealth of Pennsylvania.

c) Respondent PTC is a corporation and public utility company organized and existing under the laws of the Commonwealth of Pennsylvania for the purpose of providing transit service in and about the City of Philadelphia pursuant to certificates of convenience and necessity issued by the Public Utility Commission of the Commonwealth of Pennsylvania and pursuant to various contracts between PTC and the City.

2. The two contracts particularly involved here are:

a) The Agreement of July 1, 1907, between the City and PTC's predecessor, the Philadelphia Rapid Transit Company; and

b) The Agreement of June 12, 1939, between the City and PTC, amending the Agreement of 1907.

3. By Section Eleventh of the Agreement of 1907, as amended, the City reserved "the right to purchase all the property, leaseholds and franchises" of PTC.

4. On June 8, 1965, the City by an Assignment Agreement authorized by Ordinance of June 4, 1965, assigned its reserved right of purchase to SEPTA.

5. On June 8, 1965, in accordance with Section Eleventh

of the Agreement of 1907, as amended, SEPTA gave PTC notice of SEPTA's intention to exercise the reserved right to purchase PTC's assets.

6. On June 18, 1965, SEPTA and the City filed a petition for a judgment that would declare whether SEPTA as the City's assignee had a right to purchase PTC's assets.

7. On July 14, 1966, after hearing on SEPTA's and the City's petition for declaratory judgment, this Court filed a decree nisi accompanied by an opinion, findings of fact, and conclusions of law, stating in detail the provisions of the Agreements of 1907 and 1939, their origin, and their legal effect (as this Court concluded that legal effect to be). On September 16, 1966, on exceptions filed, *inter alia*, by PTC, the Court en banc approved this Court's opinion, findings of fact, and conclusions of law, and made the decree nisi final. It is unnecessary to repeat the findings and conclusions here, since they are matters of judicial record. In summary, this Court and the Court en banc held:

a) The City's reserved right of purchase, the City's assignment of the right to SEPTA, and SEPTA's exercise of the right, were valid.

b) SEPTA is accordingly entitled and obliged to purchase the property, leaseholds, and franchises of PTC at a price to be made up of four amounts specified in the formula stated in Section Eleventh of the Agreement of 1907, as amended: (i) the amount of PTC's outstanding bonds, mortgages, and ground rents; (ii) the par value of PTC's outstanding preferred stock; (iii) $10 for each share of PTC's outstanding common stock; and (iv) the amount of PTC's undistributed corporate surplus, if any, which means what PTC calls its "Retained Earnings".

c) These four amounts will be determined from PTC's balance sheet as of the date SEPTA pays for PTC's assets. To raise the money to pay for the assets, SEPTA will have to issue and sell bonds, which it cannot practically do while litigation regarding its right to buy PTC's assets is unresolved. Accordingly SEPTA need not make payment until a reasonable time (at least six months) after such litigation has been finally disposed of without the possibility of further appeal.

d) When SEPTA does make payment, it will acquire PTC's assets free of any indebtedness.

e) PTC has a vested liability to pay pensions to its retired employees. This liability will remain PTC's obligation after SEPTA has bought PTC's assets.

8. On December 12, 1966, PTC appealed the foregoing decision to the Supreme Court.

9. PTC's "Retained Earnings" are about $9,500,000; PTC's vested liability to pay pensions to its retired employees is about $17,000,000.

10. The Transport Workers Union of America and Transport Workers Union of Philadelphia, Local No. 234, filed a petition with the Supreme Court asking leave to intervene as a party appellant in PTC's appeal to the Supreme Court. The Unions prayed for an order directing that the vested pension liability to retired employees be funded. In answering the Union's petition PTC on December 19 advised the Supreme Court that "An order directing funding by PTC would be a futile gesture unless coupled with an order permitting PTC to sell assets free of any claim of SEPTA. PTC does not have the money to pay its current obligations and fund the pension claims. A funding order would produce a chaotic condition: (1) a forced

sale of many millions of dollars of tangible property would become necessary; (2) distribution, if any, to PTC stockholders would have to be withheld indefinitely because the correctness of the actuarial estimate of the amount required to fund cannot be determined for years; and if it should ultimately prove inadequate, directors who had authorized distribution to stockholders would be jointly and severally liable for the deficiencies up to the amount distributed; and estates of deceased directors could not be settled pending a determination of their ultimate liability."

11. On December 20, 1966, eight days after PTC appealed to the Supreme Court, and one day after PTC's foregoing representations to the Supreme Court, a meeting of PTC's Board of Directors was held. The attending Directors made these decisions:

a) By a vote of six to five they declared a dividend of $1.00 per share on the common stock of PTC, payable to shareholders of record as of January 15, 1967, to be distributed January 31, 1967. The aggregate amount of this dividend is about $1,700,000.

b) A resolution was adopted authorizing discussions between PTC, Red Arrow, and other transit companies in the Philadelphia area. At least the Vice President and Treasurer of PTC, who is also in charge of PTC's public relations, understood the resolution to direct PTC's officers to enter into preliminary discussions with Red Arrow and the other transit companies in the Philadelphia area looking toward ultimate consolidation of the companies into a unified and coordinated mass transit system. The Vice President so informed the press, which reported the resolution accordingly; the Bulletin's headline was, "PTC Directors Seek Merger To Red Arrow", followed by a headline, "Unified Private Net Is Fixed as Goal." Neither

the Vice President nor any one else on behalf of PTC disputed the accuracy of these headlines or of the story that accompanied them until the premilinary hearing before this Court on December 28 and 29, 1966.

c) A resolution was adopted that PTC should sometime after January 1, 1967, file in the United States District Court a complaint challenging SEPTA's right to acquire PTC's assets under the reserved right of purchase provided in the Agreement of 1907, as amended.

12. PTC did not seek or obtain the consent of SEPTA or the City either to the declaration of a dividend or to preliminary discussions with Red Arrow or any other transit company regarding the consolidation or merger of any of those companies with PTC.

III. Discussion.

A. What Is the Jurisdiction of This Court?

1. *Did PTC's appeal to the Supreme Court deprive this Court of jurisdiction?*

PTC contends, to quote its brief, that "'. . . [PTC's] appeal [to the Supreme Court] has deprived this Court of jurisdiction to act in this case while the record is before the Supreme Court in the pending appeal.'" The contention is without merit.

When an appeal is taken, the lower Court does lose jurisdiction to change its decision. See, for example, *Sowers Estate,* 383 Pa. 566, 573-574 (1956), holding that after an appeal a lower Court was without power to file a revised schedule of distribution, and *Corace v. Balint (et al., Appellant),* 418 Pa. 262, 269, 275-276 (1965), holding that after an appeal a lower Court could not rescind an adjudication or vacate an order. But a lower Court does not lose all jurisdiction.

As stated in 2 P. L. E., *Appeals*, § 241, at 377:

> "Notwithstanding the taking of an appeal, the lower court retains the right, concurrently with the reviewing court, to control the actions of the parties in so far as to preserve the status quo. . . ."

This rule is illustrated by *New Brighton &c., R. R. Co. v. The Pittsburgh &c., R. R. Co.*, 105 Pa. 13 (1884), which is cited by P. L. E., *supra*. One railroad obtained from a lower Court an injunction forbidding another railroad to undertake certain construction over a disputed right of way. The enjoined railroad appealed to the Supreme Court and posted a supersedeas bond: it then proceeded to ignore the lower Court's injunction by continuing its construction preparations; when the lower Court held it in contempt, it appealed again to the Supreme Court, contending, as PTC does here, that its earlier appeal to the Supreme Court had ousted the lower Court of all jurisdiction. In rejecting this contention the Supreme Court in 105 Pa. at 24-25 made the following statement, which remains the most comprehensive and lucid statement of what jurisdiction a lower Court does retain after an appeal has been taken to the Supreme Court:

> ". . . [W]hile the appeal was so taken as to make it a stay of all proceedings for the enforcement of the decree, it by no means follows that the authority of the court below, in other matters that might arise pending the appeal, was either superseded or suspended. The purpose of staying proceedings was not to oust the jurisdiction of the court below, but to preserve the status of the respective companies as it was before and at the date of the decree. So far as they were then respectively in actual possession of portions

of the disputed location, exercising acts of ownership thereon, they each, as against the other, had a right to continue in the undisturbed enjoyment thereof until the appeal was determined. To that end it is necessary that the power to preserve and maintain the status in quo of parties litigant should be lodged where it can be conveniently exercised. It is conceded that this court is invested with the necessary authority for that purpose, but it does not follow that the same power cannot be rightly exercised by the court from whose decree the appeal has been taken. Indeed there is no valid reason why that court should not possess concurrent authority in the premises. On the contrary there are good reasons why it should. The right of recourse to it for such purposes greatly subserves in most cases, the convenience of the parties; and when this court is not in session, as is the case several months in succession, it affords the only available mode of redress then accessible to parties aggrieved.

"It follows from what has been said, that for certain purposes, not involving the enforcement of the decree, the power of the court below was not suspended. Pending the appeal, which operated as a stay of proceedings to enforce the terms of the decree, the court had a right to control the action of the respective parties so far, at least, as to preserve the status in quo of each in relation to the possession of the disputed location . . . ."

Accord: N. S. White, Ap. v. Beatrice M. White, 106 Pa. Superior Ct. 85, 87-88 (1932).

Therefore, there can be no question that this Court has jurisdiction at common law to preserve the status quo. In addition, however, this Court has jurisdiction by virtue of two statutes.

The first statute, which prescribes appellate procedure in general, is the Act of May 19, 1897, P. L. 67, as amended. It provides in Section 16, 12 PS § 1154, that

> "Nothing herein contained shall operate to hinder the court below . . . from proceeding with the cause appealed from in anything not affected by the subject-matter of the appeal. . . ."

This simply codifies the rule of the *New Brighton* case, *supra.*

The second statute, which is specifically applicable to this case, is the Uniform Declaratory Judgments Act, *supra.* It provides in Section 8, 12 PS § 838, that

> "Further relief, based on a declaratory judgment or decree, may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be demed sufficient the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."

This is the procedure that has been followed here: SEPTA and the City filed a petition and an amended petition for supplemented relief; this Court issued a rule to show cause why relief should not be granted; and a hearing on the rule was held.

2. *What sort of relief may this Court grant?*

The nature and limits of this Court's jurisdiction, or power to act, having been determined, the next question is: What sort of relief may this Court grant?

The short answer to this question is given by Section 8 of the Uniform Declaratory Judgments Act, *supra,* 12 PS § 838: whatever is "necessary or proper."

What is necessary or proper will, however, vary from case to case. It has already been observed that in an action declaring the validity of insurance coverage, the appropriate supplemental relief may be a hearing to determine damages. *Phila. Mfrs. Mut. Fire Ins. Co. v. Rose, supra.* In this case the appropriate supplemental relief is a preliminary injunction. This follows from the nature of this Court's retained jurisdiction, which, as has been seen, is to preserve the status quo. The function of a preliminary injunction ". . . is simply preventive—to maintain things in the condition in which they are at the time until the rights and equities of the parties can be considered and determined after a full examination and hearing." *Audenreid v. Phil. & Reading Railroad Co.,* 68 Pa. 370, 375 (1871); and see cases collected in 18 P. L. E., *Injunction,* § 101.

These authorities answer on general principles the question of what sort of relief this Court may grant. The question has also been answered with specific reference to the supplemental relief provision of the Uniform Declaratory Judgments Act, *supra,* 12 PS § 838, by the Supreme Court of Wisconsin in *Belanger v. Local Division No. 1128,* 256 Wis. 274, 41 N. W. 2d 607 (1949). This decision is not merely persuasive because well reasoned. Wisconsin has also enacted the Uniform Declaratory Judgments Act, so that the Supreme Court of Wisconsin had before it the same statutory language as is before this Court. Moreover, Section 15 of the Uniform Declaratory Judgments Act, *supra,* 12 PS § 845, provides that

> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it . . . . ."

Said the Supreme Court of Wisconsin in 256 Wis. at 278:

> "In relation to the jurisdiction of the court to grant supplemental relief after the entry of judgment in an action under sec. 269.56(8), Stats., there are in point the following statements and conclusions in *Morris v. Ellis,* 221 Wis. 307, 315, 266 N. W. 921,—
>
> " 'The contention is that sec. 269.56(8) does not authorize the retention by a court of any jurisdiction after entering a declaratory judgment. True, it does not, but it does not follow that a court may not retain jurisdiction to enter such subsequent orders as will make effective the declaratory relief. An action for declaratory relief is essentially equitable in character. *Rosenberg v. Whitefish Bay,* 199 Wis. 214, 225 N. W. 838. The power of a court of equity to retain jurisdiction to give complete and effectual relief is well established. Further than this, it is clear that the statute authorizes the granting of further relief upon petition, and the question whether a court should retain jurisdiction or merely await a proper petition would seem to be rather academic.
>
> " 'The intimation that the supplemental relief contemplated by the statute is limited to further declaratory relief cannot be sustained. It includes any relief essential to making effective the declaratory judgment entered by the court. See Borchard, Dec. Judg. (1934), p. 172; 11 Ind. Law Rev. 376.' "

3. *To recapitulate.*

From the foregoing the following is clear: PTC's appeal to the Supreme Court did not deprive this Court of all jurisdiction. This Court retains jurisdiction "to con-

trol the action of the respective parties so far, at least, as to preserve the status in quo of each . . . .'' See the *New Brighton* case and Section 16 of the Act of May 19, 1897, *supra.* In exercising this jurisdiction this Court is to proceed as a Court of Equity proceeds on a rule to show cause why a preliminary injunction should not issue. See the *Audenreid* case, Section 8 of the Uniform Declaratory Judgments Act, and the *Belanger* case, *supra.* It now becomes appropriate to consider how these principles apply to the undisputed facts of this case.

B. Is the Relief Requested by SEPTA and the City Necessary or Proper to Preserve the Status Quo?

When the pleadings and the issues were stated above, it was indicated that SEPTA and the City have requested a preliminary injunction restraining PTC from (1) paying a dividend; (2) engaging in negotiations looking to a merger of PTC with the Red Arrow or any other transit company; (3) starting an action in the United States District Court challenging the validity of the Agreement of 1907, as amended; and (4) generally, from taking any other action in derogation of the Agreement of 1907, as amended, or with respect to PTC's assets other than in the ordinary course of business. Each request will be considered in turn.

1. *The request for a preliminary injunction restraining PTC from paying a dividend.*

This request must be granted; there can be no doubt that if PTC is permitted to pay the dividend declared at the Board of Directors' meeting of December 20, 1966, the status quo may be destroyed.

This Court and the Court en banc have held that SEPTA is entitled under the Agreement of 1907, as

amended, to acquire PTC's property, leaseholds, and franchises by paying a price determined by a formula tied to PTC's debt, stock, and undistributed corporate surplus, and that PTC's undistributed corporate surplus is the amount carried on its balance sheet as "Retained Earnings."

The dividend declared on December 20, 1966, is about $1,700,000. It would be paid from PTC's "Retained Earnings", which are about $9,500,000.

PTC contends that SEPTA cannot be harmed, or the status quo disturbed, if the dividend is paid: SEPTA must pay for PTC's "Retained Earnings" as one of the components of the formula price; however, instead of having to pay $9,500,000 for the "Retained Earnings", it will only have to pay $7,800,000 (the "Retained Earnings" as diminished by the dividend). This contention, however, treats the case as though it were finally concluded instead of on an undecided appeal.

One of the issues that will be considered on the appeal is whether PTC has any undistributed corporate surplus, "Retained Earnings" or otherwise, for which SEPTA must pay under the formula. This Court and the Court en banc held that PTC has a vested pension liability to retired PTC employees. SEPTA contends that this vested liability (of about $17,000,000) extinguishes PTC's undistributed corporate surplus (of about $9,500,000). If the Supreme Court determines that PTC has no undistributed corporate surplus, the next question will be what effect this determination will have on the price that SEPTA must pay under the formula. If the surplus is eliminated as one of the components of the formula, the remaining components will be the amount of PTC's bonds, mortgages, and ground rents, and $10 for each share of PTC's outstanding common stock. PTC will undoubtedly argue to the Supreme Court that even if PTC's vested pension lia-

bility does extinguish PTC's surplus, thereby creating a deficit, SEPTA must still pay $10 for each share of PTC's outstanding common stock. If the Supreme Court accepts this argument, the payment in the meantime of a dividend of $1,700,000 will have destroyed the status quo. If no dividend had been paid, PTC's deficit would have been "Retained Earnings" of $9,500,000, less the pension liability of $17,000,000, or $7,500,000; with the dividend paid, the deficit would be "Retained Earnings" of $7,800,000 (being $9,500,000 reduced by the dividend of $1,700,000), less the pension liability of $17,000,000, or $9,200,000. Thus SEPTA would be obliged to assume a larger deficit with no corresponding reduction in the purchase price; this change in SEPTA's and PTC's respective positions would have occurred because of PTC's unilateral action in declaring and paying a dividend after the decisions of this Court and the Court en banc and before the decision of the Supreme Court.

Other ways in which payment of the dividend might destroy the status quo may be imagined.

PTC might be required to fund, or it might choose to fund, its pension obligation to retired employees. PTC has denied that it is required to fund the obligation. However, the Unions argued to the Court en banc (which found it unnecessary to decide the point), and, as may be seen from their petition to intervene as party appellant, will argue to the Supreme Court, that PTC should be required to fund the obligation. If funding is required, or if PTC chooses to fund, PTC will have to use its "Retained Earnings", thereby creating a deficit the size of which will vary according to whether the dividend has or has not been paid.

SEPTA suggests that if the dividend is paid the status quo will be destroyed in that PTC will become unable to give good title to its assets. It is SEPTA's position that a company that has a vested pension obligation of

$17,000,000 but retained earnings of only $9,500,000 may not legally declare a dividend. In support of this position SEPTA refers to the unappealed from decree filed in December of 1964 by Court of Common Pleas No. 4 of Philadelphia as of No. 2529 of the March Term, 1964, permanently enjoining PTC from paying a dividend declared in 1964, after a hearing in which a portion of the proof concerned PTC's pension liability. SEPTA also refers to PTC's statement to the Supreme Court in this case that "PTC does not have the money to pay its current obligations and fund the pension claims."

The City suggests that in any case the dividend is illegal because declared by a Board of Directors from which the City's representatives have been excluded contrary to the Agreement of 1907, as amended.*

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* At the preliminary hearing before this Court the following facts were proved (and would have been stated as findings of fact had they been necessary to a decision on the request for a preliminary injunction): Section Fourth of the Agreement of 1907, as amended, and Articles III and V of PTC's Articles of Incorporation provide that the Mayor and four citizens of the City shall be Directors of PTC. However, on July 27, 1965, which was a little over a month after SEPTA and the City filed their action for a judgment that would declare whether SEPTA did have the right to buy PTC's assets under the Agreement of 1907, as amended, PTC announced that the City representatives who had been appointed to the PTC Board of Directors pursuant to Section Fourth of the Agreement of 1907, as amended, would not be permitted to attend or participate in any subsequent meetings of the Board of Directors. PTC asserted that this action was justified because, according to it, the Agreement of 1907, as amended, had expired on June 30, 1965. Among the conclusions of this Court on July 14, 1966, affirmed by the Court en banc on September 16, 1966, was the conclusion that the Agreement of 1907, as amended, has not expired. Nevertheless, PTC has refused to permit any of the City representatives designated pursuant to Section Fourth of the Agreement of 1907, as amended, to attend or participate in any way in any meeting of the PTC Board of Directors held since July 27, 1965. PTC has persisted in this refusal despite letters from the City to PTC dated August 3, 1965, and May 5, May 31, and October 6, 1966, requesting PTC to recognize the persons appointed by the City as the City's representatives on PTC's Board of Directors.

However, it is unnecessary to consider these suggestions by SEPTA and the City now, and the Court has declined to make the findings of fact requested in support of the suggestions. It is enough to note what has just been observed: So far the undisputed evidence demonstrates that the impact of the dividend on the respective rights of SEPTA, PTC, and the Unions may vary according to how the Supreme Court resolves the issues presented by the appeals pending before it. To preserve the respective positions of the parties, therefore, it is essential to enjoin preliminarily the payment of the dividend. If at a further hearing PTC can show that despite what has been proved to date the dividend may not destroy the status quo, the preliminary injunction will be dissolved.

PTC's final contention is that even if the Supreme Court were to resolve the issues now pending before it in such a way that SEPTA will suffer a loss of the amount of the dividend, SEPTA may recoup the loss by proceeding against PTC's Directors in a surcharge suit. The contention is without merit. There has been no showing, nor did PTC attempt to show, that the assets of the six Directors who voted to declare the dividend are sufficient to satisfy a claim of $1,700,000 (the amount of the dividend). And see *Philadelphia v. Phila. T. Co., Aplnt.*, 386 Pa. 231 (1956), where an injunction preliminarily enjoining PTC from paying a dividend was affirmed. Mr. Chief Justice Horace Stern said for the majority of the Court: *

> "Pending the determination of this controlling question [whether "the proposed dividend would be entirely legal as coming out of earned surplus and not

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* Mr. Justice (now Mr. Chief Justice) Bell dissented on the ground that the City had no standing to obtain the injunction. 386 Pa. at 240. He noted that the City had not exercised its reserved right of purchase. 386 Pa. at 245 *et seq.* Here, the reserved right of purchase has been exercised.

involving any capital impairment''] the issuance of a preliminary injunction was entirely proper, and indeed practically necessary in order to preserve the rights of the City in case the issue should finally be decided in its favor, because it would otherwise have suffered irraparble harm had the dividend actually been paid to the Company's 24,000 stockholders scattered throughout the country: cf. *Pennsylvania State Chamber of Commerce v. Torquato,* 386 Pa. 306, 125 A. 2d 755; in that event there would not be any adequate remedies at law available to the City which therefore would be entitled to seek equitable relief by way of a preliminary injunction: *Duquesne Light Company v. Upper St. Clair Township,* 377 Pa. 323, 105 A. 2d 287. On the other hand, the stockholders, if it be ultimately determined that the dividend was properly payable, would have suffered merely a temporary delay in their receipt of the dividend payments, unavoidable under the circumstances.'' (386 Pa. at 235.)

2. *The request for a preliminary injunction restraining PTC from engaging in negotiations looking to a merger of PTC with the Red Arrow or any other transit company.*

This request also must be granted.

Among the amounts that SEPTA must pay for PTC's assets under the Agreement of 1907, as amended, are the amount of PTC's outstanding bonds and mortgages and $10 for each share of PTC's outstanding common stock. It is probable to the point of inevitability that if PTC were to merge with Red Arrow or another transit company, some or all of these amounts would be increased. This is apparent whether or not PTC's Board of Directors has the power to agree to a merger so long as the City's representatives are excluded from the Board, and whether or not

heed is given to Section Second of the Agreement of 1907, as amended, which provides that PTC may not extend its facilities by raising capital unless the City consents.

It follows that PTC's present Board could, by action taken after PTC's appeal to the Supreme Court but before the Supreme Court's disposition of the appeal, unilaterally modify the formula price that SEPTA will have to pay for PTC's assets if the Supreme Court upholds the Agreement of 1907, as amended.

PTC has conceded that such a modification of the status quo would be improper. Its position is that there is no basis for the allegation in SEPTA's and the City's amended petition for supplemental relief that PTC's Board of Directors at the December 20, 1966, meeting authorized discussions looking to merger.

At the start of the preliminary hearing before this Court PTC's counsel said:

> "Now so far as this merger business is concerned, there just isn't any basis for it in fact. If any such action had been taken, surely I can understand people will be excited about it, and I would agree that it would be improper. But it wasn't."

And counsel went on to say that

> "All that was done [at the December 20 meeting of the Board] was merely to continue to approve the continuance of the kind of co-operative service and service to the public that has existed for a number of years."

SEPTA and the City have replied that the testimony offered by PTC, that this is "[a]ll that was done", is not true.

Immediately after the Board of Directors' meeting PTC's Vice President and Treasurer, who is also in charge

of PTC's public relations, released a statement to the press that the Board had unanimously adopted a resolution directing PTC's officers to enter into preliminary discussions with Red Arrow and the other transit companies in the Philadelphia area looking toward ultimate consolidation of the companies into a unified and coordinated mass transit system. When the Vice President later saw the statement reported in the Bulletin in a story under the headlines, "PTC Directors Seek Merger To Red Arrow", and, "Unified Private Net Is Fixed as Goal", he read the story and thought it accurate. Until the preliminary hearing before this Court neither the Vice President nor any one on behalf of PTC notified the Bulletin that the headlines and the story accompanying them were not accurate.

When PTC's President testified to this Court, however, he said that the story was not accurate. He said that the Board had only discussed

> ". . . the coordination of services, that is coordination of lines both from the standpoint of joint service and joint fares. And perhaps uniting some of our facilities such as our shop facilities. . . ."

He added that

> ". . . We have been . . . integrating the line services and the joint fares for, oh, a couple of years. And, the facilities such as the maintenance facilities we have been discussing.
>
> "THE COURT: But you have not taken action?
>
> "THE WITNESS: We have not taken action."

Just before this the President said that the discussions had occurred "six, eight months ago approximately."

When asked, "Was there anything in the resolution relating to a merger or consolidation of the two companies

and acquisition of assets or anything of that nature?", the President replied,

> "None whatsoever. I have no authority to discuss merger with Red Arrow or any other company."

SEPTA and the City note that this testimony naturally and inevitably raises a number of questions.

One of the questions is: If the discussion was only as PTC's President described, how was it that PTC's Vice President released to the press the statement that he did, and, when he read the ensuing newsstory, considered the story accurate?

When the Vice President was asked about this, he testified to this Court that he had been present at the meeting of the Board of Directors, and had heard and recalled the discussion regarding Red Arrow, but that he had "misinterpreted" the ensuing resolution. When the Court asked, ". . . at what point did you conclude that you had been under a misapprehension?" he replied,

> "Well, I think it was some time later in the week, sir."

When the Court asked, "What caused you to conclude that you had been under misapprehension?" the Vice President replied,

> "I think Mr. Lyons [PTC's President] straightened out my thinking, as I recall."

Even though the Board meeting had been on December 20, 1966, which was only eight days before the preliminary hearing before this Court, the Vice President said that he could not recall when or where the President "straightened out" his thinking; he agreed that it might have been as late as December 27, which was after SEPTA's and the City's amended petition for supplemental relief, averring

that the Directors had discussed merger with Red Arrow, had been filed and served.

It was further proved at the preliminary hearing before this Court that in each Director's folder at the start of the Board meeting was a folder entitled "PTC AND ITS COMMUNITY AND STOCKHOLDER RESPONSIBILITIES", prepared by "Ralph P. Coleman, Jr., Chairman, Committee for the Preservation of Philadelphia Transportation Co." The folder includes these remarks:

> "I fully recognize that with the current litigation before the courts it probably would not be legally possible for PTC to effect actual mergers with other transit companies. On the other hand, there is absolutely no reason why the PTC board cannot enter into exploratory discussions looking to a combining of PTC facilities with other privately-owned mass transit facilities in the Philadelphia area. A leading executive of Philadelphia Suburban Transportation Co. [Red Arrow] has indicated his belief that the board of his company would authorize management to enter into such preliminary discussions with PTC. . . .
>
> "SEPTA's main selling point has been that it would 'coordinate' or 'tie together' into a unified whole all of the mass transit operations in southeastern Pennsylvania. By opening exploration talks with Red Arrow, PTC can indicate in a very positive and practical way that private enterprise is quite capable of achieving such integration of its own. In so doing, PTC would take away from SEPTA its one basic reason for existence."

On this record it is inevitable that SEPTA and the City should argue, and should request a finding of fact, that despite the testimony of the President and Vice Presi-

dent of PTC, PTC's Board of Directors did resolve on December 20, 1966, to undertake discussions looking to the merger or consolidation of PTC and Red Arrow. Nevertheless at this point this Court has declined to make the requested finding. The hearing that has been held was preliminary only. It may be that at a further hearing further evidence will be offered regarding just what discussions the Directors did have regarding Red Arrow. At this preliminary stage it is enough to find, and the Court therefore has confined itself to finding, that, whatever the discussions were, they were such that the Vice President immediately afterwards believed that they did relate to merger or consolidation of PTC and Red Arrow, and, further, that there was no denial that this is what the discussions related to until the preliminary hearing before this Court. Since counsel has conceded that ". . . people will be excited about [merger], and I would agree that it would be improper", any discussions or action with respect to merger will be preliminarily enjoined. The restraint is necessary if the discussions did occur; if they did not, and if PTC has no intention that they shall, PTC cannot object to the restraint. If at a further hearing PTC can show a reason to lift the restraint, the preliminary injunction will be dissolved.

3. *The request for a preliminary injunction temporarily restraining PTC from starting an action in the federal court challenging the validity of the Agreement of 1907, as amended.*

On December 20, 1966, at a meeting of PTC's Board of Directors the attending Directors resolved that sometime after January 1, 1967, there should be filed on behalf of PTC a complaint in the United States District Court challenging SEPTA's right to acquire PTC's assets under the Agreement of 1907, as amended.

There can be no doubt that the resolution was adopted. At the preliminary hearing before this Court the notes of the Board's discussions, made by PTC's Assistant Secretary, were produced; for ten pages the notes are replete with references to when and why the federal action should be filed.

PTC has argued with some heat that the notes should not be admitted into evidence. At the preliminary hearing before this Court a ruling on the admissibility of the notes was deferred; the point was then briefed and argued. After consideration of the briefs and arguments it is clear that the notes are admissible, and they therefore are admitted.*

It is true that the Assistant Secretary's notes were not reduced to the usual formal minutes of a directors' meeting, and that they have never been approved by PTC's Board of Directors. It is also true that the precise terms of the resolution are not clear. For example some of the Directors' comments as referred to in the notes suggested that the complaint has been drafted and should be filed on January 3, 1967; other comments suggest that it should be filed after January 1, 1967, but that no date should be fixed. But of the Directors' resolution that a complaint should be filed in the United States District Court there can at this preliminary stage be no doubt.

In resisting admission of the Assistant Secretary's notes PTC ignores that this is only a preliminary stage. Final proof of the resolution was not required. Indeed it was not possible; the Assistant Secretary had not at the time of the preliminary hearing before this Court reduced either his notes or the resolution to final form.

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* SEPTA and the City also offered to prove the resolution by notes of the Board's meeting made by PTC's Secretary. This Court has concluded, however, that these notes were not admissible since the Secretary was not called.

Moreover PTC ignores other facts: The Assistant Secretary agreed that one of his duties was to make the notes, and he identified the notes as in his hand; also, the notes indicate that counsel for PTC, who presented PTC's case to this Court at the preliminary hearing, was not only present during the discussion regarding filing a federal action but participated in the discussion.

If the *prima facie* proof of the adoption of the resolution was in error, it would have been a simple matter for PTC to have had the Assistant Secretary say so. Or, even simpler, counsel for PTC as an officer of this Court could have advised the Court that there had been no resolution. Nothing of the sort occurred. PTC chose to remain silent, and to leave the *prima facie* proof unrebutted.

Finally, the adoption of the resolution is corroborated by formal minutes of the Board of Directors, which were proved and which foreshadow the resolution. On page 2 of the minutes of the Board of Directors' meeting on September 27, 1966, this appears:

> "The Chairman requested that Counsel report on the litigation with respect to the decision handed down before the Court en banc held on August 24, 1966. Counsel stated that a three-Judge Common Pleas Court dismissed exceptions filed by the Company to Judge Spaeth's ruling of July 14, 1966, refused a petition to intervene by the Company union, and dismissed the taxpayer suit. Counsel and Special Counsel then suggested that the Company should appeal the Court's ruling to the State Supreme Court.
>
> "After a general discussion on the litigation, Mr. Janney requested that before any action is instituted in the Federal Court that he and his counsel, Mr. Anderson, have the opportunity to review any papers proposed to be filed in that court."

And on page 4 of the minutes of the Board of Directors' meeting on November 22, 1966, this appears:

> "Mr. Joseph L. O'Brien, Jr. made a motion, which was duly seconded, that the Company take action in the Federal Court immediately upon receiving the decision from the Supreme Court on the Writ of Certiorari. A general discussion followed on the motion, after which Mr. Reavis made a motion, which was duly seconded, to amend Mr. O'Brien's motion by stating that the Board of Directors should instruct management to institute Federal Court action at the earliest proper moment, in accord with the advice of counsel. A voice vote was then taken on Mr. Reavis' motion to amend. Eleven Directors voted in favor of the motion to amend and two directors, Messrs. John T. O'Brien and Joseph L. O'Brien, Jr., voted against said motion to amend and one director, Mr. Janney, abstained. The Chairman thereupon announced that Mr. Reavis' motion to amend had been duly adopted. Mr. Joseph L. O'Brien, Jr. thereupon made a motion, which was duly seconded, to amend Mr. Reavis' amendment back to his original motion. After a general discussion, Mr. Reavis requested that his motion to amend be withdrawn. Thereupon Mr. Fogarty made a motion, which was duly seconded, to table Mr. O'Brien's motion. Upon the request of Mr. O'Brien, the vote upon Mr. Fogarty's motion was by roll call; eight directors voted in favor of the motion, four directors voted against the motion and two directors abstained, as follows: . . . ."

Because of the *prima facie* proof of the resolution at the preliminary hearing it was necessary for this Court to enter immediately after the hearing, on December 30, 1966, the last business day before 1967, an order temporarily restraining PTC from filing an action in the United States

District Court. This restraint will be continued as part of the preliminary injunction that will be filed with this opinion. The restraint will not be permanent. If at a further hearing PTC can prove that no resolution to file a federal action was adopted, it may.

The preliminary injunction against a federal action by PTC is essential to protect the jurisdiction not only of this Court but particularly of the Supreme Court.

PTC is entitled to have its appeal from the decision of the Court en banc, which upheld the Agreement of 1907, as amended, and made this Court's decree nisi final, considered by the Pennsylvania Supreme Court, and in due course the appeal will be considered. Should the appeal be dismissed, PTC is further entitled to petition the United States Supreme Court to issue a writ of certiorari to the Pennsylvania Supreme Court. But PTC is not entitled to try to defeat or circumvent the jurisdiction of the Pennsylvania Supreme Court by filing a federal action in the United States District Court raising the very questions that PTC can present to the Pennsylvania Supreme Court.

In *Wenz v. Wenz, Appellant,* 400 Pa. 397 (1960), Juanita Wenz filed a complaint in equity in the Court of Common Pleas of Lehigh County against her alleged husband, Earl Wenz, Earl Wenz Inc., and Wenz Farms, Inc.; defendants were served and filed an answer contesting the validity of the marriage between Juanita and Earl; Earl then filed a suit in the Circuit Court for Carroll County, Maryland, asking that Court to annul his marriage to Juanita; Juanita demurred in the Maryland suit and then asked the Lehigh County Court to enjoin Earl from prosecuting the Maryland suit; the Court did and Earl appealed to the Supreme Court, which affirmed the injunction with this statement at pages 399-400 of 400 Pa.:

"It is plain enough that Wenz, by his answer to the complaint in Lehigh County, voluntarily put the

validity of his marriage to the plaintiff in issue there and by subsequently instituting suit in the Maryland Court, for annulment of the marriage, contumaciously attempted to circumvent and subvert the authority and jurisdiction of the Lehigh County Court. In such circumstances, a court has not only the power but the duty to thwart such an undertaking by a restraining order adequate to the circumstances. Nonetheless, the appellant questions the jurisdiction of the court below to exercise such power in this instance.

"In *Trees v. Glenn,* 319 Pa. 487, 490-491, 181 A. 579 (1935), this court quoted from Ruling Case Law as follows: ' "The theory on which a court of equity acts in enjoining a proceeding in another court of coordinate jurisdiction is that it has jurisdiction in personam, and that, so acting, it has power to require the defendant to do, or to refrain from doing, anything beyond the limits of its territorial jurisdiction, which it might require to be done or omitted within the limits of such territory. In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject-matter of the first suit. When an injunction is granted for this purpose, it is in no sense a prohibition to these courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction." '

> "And, further, from 32 Corpus Juris, section 126, as follows: ' "The court first acquiring jurisdiction of a case will protect that jurisdiction by enjoining an action by the same parties on the same subject-matter in another court, even though that other court may also have equity jurisdiction. . . ." ' "

Two distinctions between the *Wenz* case and the present case are that in *Wenz* the lower Court was protecting its own jurisdiction, and the action enjoined was in a State Court rather than in a United States District Court. These distinctions are immaterial. It has been seen above that this Court retains jurisdiction to preserve the status quo. It can preserve the status quo by protecting not only its own jurisdiction but the appellate jurisdiction of the Pennsylvania Supreme Court. So far as restraining a federal suit as compared to a suit in another State is concerned: the decisive fact is which Court first acquired jurisdiction.

PTC insists to the contrary. It asserts that this Court is without power, apparently, in PTC's view, under any circumstances, to enjoin a party before it from filing a federal suit. This assertion is made principally on the authority of *Donovan v. City of Dallas,* 377 U. S. 408 (1964).

In *Donovan* citizens of Dallas who lived near the Dallas airport filed an action in a Texas Court to restrain Dallas from building another runway. Summary judgment was entered against them. The Texas Court of Civil Appeals affirmed, the Texas Supreme Court denied review, and the United States Supreme Court denied certiorari. The citizens then filed an action in a United States District Court. Dallas moved to dismiss but also applied to the Texas Court of Civil Appeals for a writ of prohibition to bar prosecution of the federal action. The Texas Court of Civil Appeals denied the writ but the Texas Supreme Court

granted it. On appeal the United states Supreme Court reversed, holding that the Texas Court of Civil Appeals had been right when it had held that it was without power to enjoin prosecution of the federal action.

This decision does not help PTC; indeed, it is not in point. In restraining prosecution of the federal action the Texas Supreme Court was not protecting its jurisdiction. Its jurisdiction had been exhausted by the earlier proceedings, when it denied review of the summary judgment entered by the lower Texas Court, and when the United States Supreme Court denied certiorari. If here PTC had lost in the Pennsylvania Supreme Court, and had been refused certiorari by the United States Supreme Court, and had then resolved to file an action in the United States District Court, *Donovan* would be pertinent; and this Court would decline to grant an injunction against prosecuting the federal action. Here, however, the appellate process has not been completed, and a federal action by PTC now would interfere with that process. It is that interference that this Court now enjoins.

This point, too, is ruled by *Wenz, supra,* where the Court said in 400 Pa. at 400:

> "Until the litigation in Lehigh County has been terminated, there can be no justification for a suit between the same parties, involving the same issue, and instituted subsequent to attachment of the jurisdiction of the court below, to be pending elsewhere."

So here, until the pending appeal before the Pennsylvania Supreme Court has been terminated, there can be no justification for a federal suit also challenging the validity of the Agreement of 1907, as amended. PTC must await the decision of the Pennsylvania Supreme Court; that is the orderly and dignified way to proceed.

4. *The request for general relief.*

The final request for relief to be considered is the request for an injunction preliminarily enjoining PTC from taking any action in derogation of the Agreement of 1907, as amended, or with request to PTC's assets other than in the ordinary course of business. This request also must be granted if the status quo is to be preserved until the Supreme Court has been able to decide the appeals pending before it.

In dismissing PTC's answer raising questions of jurisdiction this Court in its opinion of August 27, 1965, at page 9, affirmed *per curiam*, 419 Pa. 471 (1965), held:

> ". . . [W]hen SEPTA gave notice of its intention to buy, it became bound to buy. If the price works out under the formula stated in the agreement [the Agreement of 1907, as amended] to be more than SEPTA's directors have estimated, that is legally irrelevant. [Footnote omitted.] As a result of SEPTA's letter of June 8 [telling PTC that SEPTA intended to exercise the reserved right to purchase PTC's assets], there now exists a bilateral contract between SEPTA and PTC, binding upon both parties."

Consequently, unless this decision is reversed by the Supreme Court deciding that the Agreement of 1907, as amended, is not valid, PTC is using its assets in a capacity comparable to that of a trustee; PTC's "property, leaseholds and franchises", subjected as they are by the Agreement of 1907, as amended, to SEPTA's right of purchase, must be considered as the *res* of a trust or as any unique property. See *Detwiler et al., Aplnts. v. Capone et ux.*, 357 Pa. 495, 499 (1947), where it is said:

> "An option to purchase is analogous to a contract for the sale of land; it is in nature an encum-

brance on the land pledged. In such case the husband is a trustee of the legal title for the benefit of the purchaser, and as such the wife cannot claim dower against the vendee. Equity regards the person bound to convey as having done what he should have done, i.e., made the conveyance, and treats him as trustee for the optionee. *McClure v. Fairfield,* 153 Pa. 411, 26 A. 446; *Mineral Dev. Co. v. Hall,* 115 S. W. 230. 'Where an option is exercised the title of the optionee relates back to the date of the option and his interest is regarded as real estate as of that time': Ladner's Real Estate Conveyancing, Vol. 1, section 42-A, p. 76. See also *Kelly's Est.,* 6 D. & C. 770."

Since PTC holds its assets as trustee for SEPTA, PTC will be enjoined from conduct in derogation of SEPTA's interests, which means here that PTC may not treat its assets so as to modify unilaterally the purchase price that SEPTA must pay to acquire the assets under the formula provided in the Agreement of 1907, as amended, nor may it engage in any conduct comparable to waste or dissipation of its assets. The restraints, discussed above, against payment of a dividend or merger with any other transit company, are specific applications of this principle; a general restraint will also be ordered; thereby PTC's assets will be preserved until the Supreme Court has been able to decide the appeals pending before it.

This decision is an application of settled principles. In *Erhardt v. Boaro,* 113 U. S. 537 (1885), the Court said:

"In *Pillsworth v. Hopton,* 6 Ves. 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench 'that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated

himself out of court as to the injunction.' This doctraine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. *Jerome v. Ross,* 7 Johns. Ch. 315, 332; *LeRoy v. Wright,* 4 Sawy. C. C. 530, 535."

Accordingly, the Court now makes conclusions of law and enters a preliminary injunction as follows:

IV. Conclusions of Law.

1. This Court has jurisdiction over the parties.

2. It further has jurisdiction to grant such supplemental relief as necessary and proper:

a) to control the actions of the respective parties so far as to preserve the status quo until the Supreme Court has finally decided the appeals pending before it, and

b) to prevent any party from circumventing and subverting the authority of the Supreme Court to decide those appeals.

3. Under the facts of this case, as found above, the necessary and proper supplemental relief is an injunction preliminarily enjoining PTC from certain conduct that it has engaged in or threatens to engage in, as more specifically stated in the preliminary injunction issued below.

4. If such relief is not granted, petitioners, SEPTA and the City, will suffer irreparable injury.

V. Preliminary Injunction.

AND Now, January 6, 1967, upon motion of Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia, and after considering the Petition for Supplemental Relief, the Amended Petition for Supplemental Relief, the Answer to the Petition and Amended Petition, the evidence before the Court, the briefs and argument, and the prior record in this action, and finding that plaintiff will suffer irreparable injury if the status quo is not maintained, it is

ORDERED, ADJUDGED, and DECREED:

1. Philadelphia Transportation Company (PTC), the other defendants, the intervening defendants, and all others who are their agents, officers, employees, directors, or act under their direction, or who have acted or intend to act after consultation and in concert with the said defendants and intervening defendants, are hereby enjoined from:

a) paying any dividend or making any other distribution to PTC's shareholders, including taking action to carry out the resolution adopted by PTC's Board of Directors on December 20, 1966, which declared a dividend of $1.00 per share on PTC's common stock payable on January 31, 1967, to shareholders of record as of January 15, 1967;

b) engaging in any discussions or taking any other action either with respect to the Philadelphia Suburban Transportation Company (Red Arrow) or any other company, that might lead to a merger, consolidation, or purchase of the assets or stock of any company;

c) filing, or inducing others to file, in any State or Federal Court, any lawsuit that will in any way affect the jurisdiction of this Court, the appellate jurisdiction of the Supreme Court of Pennsylvania, or the subject matter of this litigation, other than taking any action in the Supreme Court of Pennsylvania to review any action or decision of this Court;

d) taking any action in derogation of the Agreement of 1907, as amended, or with respect to PTC's assets other than in the ordinary course of business.

2. The Temporary Restraining Order entered by this Court on December 30, 1966, is vacated.

3. A hearing on whether this preliminary injunction should be made final shall be held at a time and in a Court Room as may be agreed upon after consultation with counsel.

4. This Court retains jurisdiction to enter such further orders as may be required to maintain the status quo pending the final disposition of the issues raised in this litigation.

SPAETH, *J.*

Filed: January 6, 1967.

APPENDIX G.

Metropolitan Transportation Authorities Act of 1963

Chapter 9.

§ 2001. Short title.

This act shall be known and may be cited as the "Metropolitan Transportation Authorities Act of 1963". 1963, Aug. 14, P. L. 984, § 1.

§ 2002. Legislative finding; declaration of policy.

It is hereby determined and declared as a matter of legislative finding:

(a) That there exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated obsolete mass transportation facilities resulting in inadequate or overcrowded high cost conditions on our highways and existing mass transportation facilities;

(b) That such conditions or a combination of some or all of them have made and will continue to result in making such communities economic and social liabilities, harmful to the social and economic well-being of the entire area, depreciating values therein, reducing the tax revenues, making the metropolitan areas and their constituent communities less desirable areas in which to live and work and thereby depreciating further the general community-wide values;

(c) That the foregoing conditions cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted and are beyond remedy or control by governmental regulatory processes;

(d) That the sound replanning and redevelopment of metropolitan mass transportation facilities in accordance with sound and approved plans for their promotion, development and growth will promote the public health, safety, convenience and welfare and that the public acquisition of existing mass transportation facilities in accordance with the said sound plans for their redevelopment and promotion will promote the public health, safety, convenience and welfare;

(e) That the well-being and economic health of the counties and other communities in the metropolitan areas require integrated systems of mass passenger transportation;

(f) That it is desirable that the public transportation systems in the metropolitan areas be combined, improved, extended and supplemented by the creation of authorities as herein provided;

(g) That the establishment of metropolitan transportation authorities will promote the public safety, convenience and welfare;

(h) That it is intended that such authorities cooperate with and/or acquire existing transportation facilities that private enterprise and government may mutually provide adequate transit facilities for the convenience of the public;

(i) That it is intended that any authority created hereunder will cooperate with all municipalities and other public bodies in whose territories it operates so that the mass passenger transportation system may best serve the interests of the residents thereof;

Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the safety and welfare of the inhabitants thereof by authorizing the crea-

on of a body corporate and politic for each metropolitan rea, to be known as the Transportation Authority of such rea, which shall exist and operate for the purposes con-ained in this act. Such purposes are hereby declared to be ublic uses for which public money may be spent and private roperty may be acquired by the exercise of the power of minent domain. 1963, Aug. 14, P.L. 984, § 2.

2003. Definitions.

(a) The following terms, whenever used or referred to this act, shall have the following meanings, except in ose instances where the context clearly indicates other-ise:

(1) "Authority" shall mean any body corporate and politic created pursuant to this act.

(2) "Board" shall mean the governing and administrative body of an authority.

(3) "Mayor" shall mean the chief executive officer of any first class city in any first class county.

(4) "Governor" means the Governor of the Commonwealth of Pennsylvania.

(5) "Metropolitan area" shall mean all of the territory within the boundaries of any county of the first class and all other counties located in whole or in part within twenty (20) miles of such first class county.

(6) "Transit Vehicle" means every vehicle which is self-propelled or which is propelled by electric power.

(7) "Municipality" means any city, county, borough or township of the first or second class within any metropolitan area.

(8) The term "transportation system" shall mean all property, real and personal, useful for the transportation of passengers for hire, including but not limited to power plants, substations, terminals, garages, bridges, tunnels, subways, elevated lines, monorails, railroad motive power, trains, railroad passenger cars, and equipment, belt conveyors, inclines, car barns, street cars, buses, rails, lines, poles, wires, stations, off-street parking facilities, rights-of-way, as well as the franchises, rights and licenses therefor, including rights to provide group and party services: Provided, That such term shall not include taxicabs.

(9) The term "Federal agency" shall mean and include the United States of America, the President of the United States and any department or corporation, agency or instrumentality, heretofore or hereafter created, designated or established by the United States of America.

(10) The term "persons" shall mean and include corporations, associations and other legal entities, as well as natural persons.

(11) The term "project" shall mean any structure, facility or undertaking which an Authority is authorized to acquire, construct, improve, lease, maintain, operate, contract for, or otherwise function with respect to, under the provisions of this act.

(12) "Legislative body" shall mean, in counties of the first class, the City Council; in the other counties the Board of County Commissioners; and in the other municipalities, that body authorized by law to enact ordinances.

(13) "County Commissioners" shall mean the members of the Board of County Commissioners in each of the counties in the metropolitan area, except counties of the first class.

(14) "Commonwealth" shall mean the Commonwealth of Pennsylvania.

(15) "Majority" shall mean any whole number constituting more than half of the total number, e.g., a majority of five equals three or more; a majority of six equals four or more.

(b) Words importing the singular shall include the plural, the masculine shall include the feminine and vice versa. 1963, Aug. 14, P.L. 984, § 3.

§ 2004. Creation of transportation authorities; rights and powers.

(a) There is hereby authorized the creation of a separate body corporate and politic in each metropolitan area, to be known as the transportation authority of such area, extending to and including all of the territory in the metropolitan area. An authority shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof. An authority shall exist for the purpose of planning, acquiring, holding, constructing, improving, maintaining, operating, leasing, either as lessor or lessee, and otherwise functioning with respect to, a transportation system in the metropolitan area, and, outside of such area, whether within or beyond the boundaries of the Commonwealth, to the extent necessary for the operation of an integrated system and for the provision of all group and party serv-

ices which can be provided by transportation systems subject to acquisition under this act: Provided, however, That all services rendered by the authority outside the metropolitan area shall be pursuant to certificates of public convenience or other appropriate authorization issued to it by the Pennsylvania Public Utility Commission, or other appropriate regulatory agency of any state or federal government. An authority shall transact no business or otherwise become operative until and unless a majority of its board shall have been qualified in accordance with this act.

(b) The certification by the appointing power of each board member, and the constitutional oath of office subscribed by each member, shall be filed with the Department of State and upon the receipt of initial certifications and respective oaths of a majority of the total number of board members appropriate to any metropolitan area, the Secretary of the Commonwealth shall issue a certificate of incorporation. Such certificate shall refer to the authority by the name which shall be designated by such board members.

(c) In any suit, action or proceeding involving or relating to the validity or enforcement of any contract or act of an authority, a copy of the certificate of incorporation, duly certified by the Department of State, shall be admissible in evidence, and shall be conclusive proof of the legal establishment of the authority.

(d) A duly certified authority shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including but without limiting the generality of the foregoing, the following rights or powers:

(1) To have perpetual existence.

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts, to petition the In-

terstate Commerce Commission or other regulatory body, or join in any proceeding before any such bodies or courts in any matter affecting the operation of any project of the authority.

(3) To adopt and use and alter at will a corporate seal.

(4) To establish a principal office within the county of the first class and such other office or offices as may be necessary for the carrying on of its duties.

(5) To acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property, or interest therein, at any time acquired by it. In exercising any of the powers granted by this paragraph, the authority shall consider, inter alia, the same value factors as provided in section 8 of this act[1] in determining compensation under the exercise of eminent domain.

(6) To acquire by purchase, lease, or otherwise, and to construct, improve, maintain, repair and operate passenger transportation facilities.

(7) To make and from time to time to amend and repeal by-laws, rules, regulations and resolutions.

(8) To appoint officers, agents, employees and servants, to prescribe their duties and fix their compensation, subject, however, to specific provisions of this act.

(9) To fix, alter, charge and collect fares, rates, rentals and other charges for its facilities by zones

1. Section 2008 of this title.

or otherwise at reasonable rates to be determined exclusively by it, subject to appeal, as hereinafter provided, for the purpose of providing for the payment of all expenses and obligations of the authority, including the acquisition, construction, improvement, repair, maintenance and operation of its facilities and properties, the payment of the principal and interest on its obligations, and to comply fully with the terms and provisions of any agreements made with the purchasers or holders of any such obligations. The authority shall determine by itself exclusively, after appropriate public hearing, the facilities to be operated by it, the services to be available to the public, and the rates to be charged therefor. Any person aggrieved by any rate or service or change of service fixed by the authority may bring an appeal against the authority in the court of common pleas of any county in the metropolitan area in which the charge, service or change of service shall be applicable, for the purpose of protesting against any such charge, service or change of service: Provided, however, That the grounds for such suits shall be restricted to a manifest and flagrant abuse of discretion or an error of law; otherwise, all such actions by the authority shall be final. Whenever two or more appeals shall be brought against the same action of the authority, exclusive jurisdiction for the determination thereof shall be vested in the first such court to receive such an appeal, and all other courts receiving subsequent appeals against the same action shall transfer such appeals to the said first court. Upon the finding of an error of law or a manifest and flagrant abuse of discretion, the court shall issue an order setting forth the abuse or error and returning the matter to the authority for such further action as shall be not inconsistent with

the findings of the court. Further appeals may be taken to the Superior Court within thirty days after the court of common pleas shall have rendered its decision. No appeal from the action of the authority or from the decision of the court of common pleas shall act as a supersedeas, except when taken by the authority or any county or municipality, or, in other cases, when specially granted after a finding that irreparable and extraordinary harm will result. The courts shall give priority to all such appeals and no bond shall be required of any party instituting such an appeal under the provisions of this section.

(.1) The authority shall fix such rates, fares and charges in such manner that they shall be at all times sufficient in the aggregate, and in conjunction with any grants from federal or other sources, and any other income available to the authority, to provide funds (i) for the payment of all operating costs and expenses which shall be incurred by the authority, and (ii) for the payment of the interest on and principal of all bonds, certificates and other obligations payable from said revenues and to meet all other charges upon such revenues as provided by any trust agreement executed by the Authority in connection with the issuance of bonds or certificates under this act.

(.2) The board may enter into agreements with the United States Post Office Department for the transportation of mail and payment of compensation to the authority in lieu of fares for the transportation of letter carriers in uniform at all times. The board may make similar agreements within any municipality, in and by which they are employed, for the transportation of fire-

men and public health nurses when in uniform, and of policemen when in uniform or when not in uniform, upon presentation of identification as policemen. The Board may also provide free transportation for employees of the authority when in uniform or upon presentation of identification as such employees.

(10) To borrow money from private lenders, or from the State or Federal government, or from any municipality in the metropolitan area, in such amounts as may be necessary or desirable for the operation and work of the authority; to make and issue negotiable notes, bonds, refunding bonds and other evidences of indebtedness or obligations of the authority in connection with any such borrowing or refunding or in payment in whole or in part of all or any part of any transportation system, or any bonds, shares or other securities of any corporation owning or operating any such system, or any franchises, property, equipment or interests acquired or to be acquired by the authority, and to secure the payment of such bonds, or any part thereof, by pledge or deed of trust of all or any of its revenues, rentals, and receipts, and to make such agreements with the purchasers or holders of such bonds or with others in connection with any such bonds, whether issued or to be issued as the authority shall deem advisable and in general, to provide for the security for said bonds and the rights of the holders thereof.

(11) To apply for and to accept grants, loans and other assistance from, and to enter into contracts, leases or other transactions with, the federal government or any agency or instrumentality thereof, the Commonwealth, any municipality or corporation, or

any person whatsoever, for any of the purposes of the authority, and to enter into any agreement with the Federal government in relation to such grants, loans or other assistance: Provided, That such agreement does not conflict with any of the provisions of any trust agreement securing the payment of bonds or certificates of the authority.

(12) To make and execute all contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and any contract or instrument when signed by the chairman or vice chairman and secretary or assistant secretary or treasurer or assistant treasurer of the authoity shall be held to have been properly executed for and on its behalf. Without limiting the generality of the foregoing, the authority is also authorized to enter into contracts for the purchase, lease, operation or management of transportation facilities within or without the metropolitan area or within or without the Commonwealth: Provided, however, That whenever such facilities are located outside the metropolitan area, they shall be subject to the jurisdiction of the appropriate regulatory agencies.

(13) To acquire by eminent domain any real or personal property including improvements, fixtures and franchises of any kind whatever for the public purposes set forth in this act in the manner hereinafter provided.

(14) To pledge, hypothecate, or otherwise encumber, all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority.

(15) To do all acts and things necessary for the promotion of its business, and the general welfare of

the authority to carry out the powers granted to it by this act or any other acts.

(16) To enter into contracts with the Commonwealth, its agencies and instrumentalities, municipalities or corporations, on such terms as the authority shall deem proper for the use of any facility of the authority and fixing the amount to be paid therefor.

(17) To enter into contracts of group insurance for the benefit of its employees, or to continue any existing insurance and/or pension or retirement system and/or any other employee benefit arrangement covering employees of an acquired existing transportation system, and/or to set up a retirement or pension fund or any other employee benefit arrangement for such employees.

(18) The authority shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth or of any of its political subdivisions, nor shall the Commonwealth or any political subdivision thereof be liable for the payment of principal or interest on such obligations.

(19) Private rights and property in the beds of existing public highways vacated in order to facilitate the purposes of the authority shall not be deemed destroyed or ousted by reason of such vacation, but shall be acquired or relocated by the authority in the same manner as other property.

(20) To have the right to use any public road, street, way, highway, bridge or tunnel for the operation of a transportation system within the metropolitan area: Provided, however, That in all cases involv-

ing the facilities of a railroad, any operations of which extend beyond the metropolitan area, the exercise of this right by the Authority shall be subject to the jurisdiction of the Public Utility Commission under sections 409, 410 and 411 of the Public Utility Laws.[2]

(21) To lease property or contract for service, including managerial and operating service, whenever it can more efficiently and effectively serve the public by so doing, rather than conducting its own operations with its own property.

(22) To self-insure or otherwise provide for the insurance of any property or operations of the authority against any risks or hazards.

(23) To act as agent of the State, or of the Federal government or any of its instrumentalities or agencies, for the public purpose set out in this act.

(24) To conduct examinations and investigations and to hear testimony and take proof, under oath or affirmation at public or private hearings, as hereinafter provided, on any matter material to the public purposes set forth in this act.

(25) To make available to the government of a municipality or any appropriate agency, board or commission thereof, the recommendations of the authority affecting any area in the authority's field of operation or property therein, which it may deem likely to promote the public health, morals, safety and welfare.

(26) To form plans for the improvement of mass transportation in order to promote the economic development of the metropolitan area in which the transportation authority operates; to make recommenda-

2. Sections 1179, 1180, 1181 of this title.

tions concerning mass transportation facilities which the authority does not own or operate; to make recommendations concerning throughways and arterial highway connections to the Department of Highways and to other appropriate governmental bodies; and otherwise to cooperate with all such governmental bodies. The authority shall give advance notice to the Department of Highways of any plans which it may have for the occupation or use of any part of any State highway.

(27) The authority shall not have power to levy taxes for any purpose whatsoever.

(28) It shall be the duty of the board, as promptly as possible, to rehabilitate, reconstruct, and extend as possible, all portions of any transportation system acquired by the authority and to maintain at all times a fast, reliable and economical transportation system suitable and adapted to the needs of the municipalities served by the authority and for safe, comfortable and convenient service. To that end the board shall make every effort to utilize high speed rights-of-way, private or otherwise, to the maximum extent practicable, to avoid air pollution by its vehicles, to abandon no physical property which has useful and economical capabilities, and to extend its rail and highway services into areas which have sufficient need for them to economically or strategically justify such extension.

(29) To agree with the constituent municipalities in which it operates for the lease of present and future municipal property, where such a lease would be advantageous to the authority in the financing or the operation of improved passenger transportation ser-

vice. 1963, Aug. 14, P. L. 984, § 4, as amended 1966, Feb. 2, P. L. (1965)—, No. 587, § 1.

§ 2005. Power to acquire property, franchises, etc.

(a) The authority shall have power to acquire by purchase, condemnation, lease, gift, or otherwise, all or any part of the property of any public utility operating a transportation system within the metropolitan area, including but not limited to, the plant, equipment, property rights in property reserve funds, employees' pension or retirement funds, special funds, franchises, licenses, patents, permits, operating rights, and paper documents and records, which said property shall be located within the metropolitan area and shall be appropriate for the purposes for which the authority is established, as well as all or any part of the right-of-way, equipment, fixed facilities, and other property of any kind of any such utility, extending beyond the boundaries of the metropolitan area and forming, or capable of forming, part of an integrated suburban rapid transit or rail transportation facility, connecting with rapid transit or electric railway lines of the authority in super highways or elsewhere. No interest in the right-of-way of a railroad company the operations of which extend beyond the metropolitan area shall be acquired or occupied under the power of eminent domain pursuant to this section or any other section of this act without the consent of said railroad. Such properties, upon acquisition by or lease to the authority, shall become and be operated as part of the transportation system of the authority, and the authority shall have all powers in connection with such properties and such operations as are conferred by this act. Except as provided in the next following sentence, all condemnations authorized by this section shall be pursuant to section 8 of this act. The provisions of Section 407 of Article IV (ex-

cept as provided in subsection (b) of this section) and of Article VII of the act of June 22, 1964 (P. L. 84), known as the "Eminent Domain Code," shall be the only provisions of said "Eminent Domain Code" applicable to condemnations so authorized. The authority shall also have the power to enter into agreements to operate any such lines located or extending beyond the boundaries of the metropolitan area, such agreements to be subject to all other provisions of this act. The authority shall have power to lease or purchase any municipally-owned local transportation subways or other municipally-owned local transportation facilities for operation and maintenance by the authority.

(b) Whenever the authority shall condemn all or substantially all of the property of a transportation system, it may elect to commence condemnation proceedings without immediate passage of title by inserting a provision to that effect in the declaration of taking. In that event, the provisions of Section 407 of the "Eminent Domain Code" shall not apply, and the title shall not pass to the authority and the authority shall not be entitled to possession until payment to the condemnee or into court of the amount of the just compensation payable for the property taken (determined as of the date of filing of the declaration of taking), as finally determined in accordance with the provisions of this act: Provided, That such payment occurs within one year of such final determination: and Provided further, That from and after the filing of the declaration of taking until the payment to the condemnee of just compensation for the condemned property, the authority shall have the right to petition the court having jurisdiction of the proceedings to prevent waste, substantial disposition or any transaction with respect to the condemned property other than in the ordinary course of business without obtaining the prior written consent of the authority. The

condemnee shall have no right to tender possession of the property or otherwise to demand payment of any compensation prior to such passage of title. 1963, Aug. 14, P.L. 984, § 5, as amended 1965, Dec. 27, P.L. —, No. 505, § 1.

§ 2006. Power to buy, lease or sell property.

The authority shall have power to acquire by purchase, condemnation, lease, gift or otherwise, any property and rights useful for its purposes and to sell, lease, transfer or convey any property or rights when no longer useful or exchange the same for other property or rights which are useful for its purposes. 1963, Aug. 14, P.L. 984, § 6.

§ 2007. Power to contract with public utilities.

The authority shall have power to enter into agreements with any public utility operating a railroad or any other transportation facility, either within or without the metropolitan area for the joint use of any property of the authority or public utility or the establishment of through routes, joint fares and transfer of passengers. 1963, Aug. 14, P.L. 984, § 7.

§ 2008. Removal or relocation of utility structures; power of eminent domain.

(a) The Authority shall have power, subject to relevant provisions of paragraph 4(d)(20) of this act,[1] to require persons or corporations owning or operating public utility structures and appliances in, upon, under, over, across or along the public roads, streets, or other public ways in which the authority has the right to own, construct, operate or maintain transportation facilities to remove such public utility structures and appliances from their loca-

1. Section 2004(d)(20) of this title.

tions. If any person or corporation owning or operating public utility structures and appliances fails or refuses so to remove or relocate them, the authority may remove or relocate them; the authority shall provide the new location which the structures or appliances as relocated shall occupy and to that end the authority is hereby authorized to acquire by purchase or by the exercise of the power of eminent domain any necessary land or right-of-way for such purpose if the new location shall not be in, on or above a highway, road or street. The exact new location shall be chosen by agreement of the authority and the utility. Upon the completion of such relocation, the authority shall reimburse the public utility for the cost of relocation which shall be the entire amount paid by the utility properly attributable to the relocation of the structure or appliance after deducting the cost of any increase in the service capacity of the new structure or appliance and any salvage value derived from the old structure or appliance. If an issue shall arise between the authority and the public utility as to the amount of the cost of relocation or the new location either party may institute a proceeding by complaint before the Pennsylvania Public Utility Commission which is hereby clothed with exclusive jurisdiction to hear and determine such issue. Appeal from the order of the commission in any such proceeding may be taken in the same manner as is prescribed by the act of May 28, 1937 (P.L. 1053), known as the "Public Utility Law",[2] for appeals from other orders of the commission.

(b) The authority shall have the right of eminent domain which may be exercised, either within or without the metropolitan area, to acquire private property and property devoted to any public use which is necessary for

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2. Section 1101 et seq. of this title.

the purposes of the authority, except property of a public utility operating transportation facilities extending beyond the boundaries of the metropolitan area: Provided, however, The Authority shall have the right of eminent domain to acquire property of any railroad which property is not used for or in connection with the transportation of persons or property and to acquire rights and easements across, under or over the right-of-way of such railroad whenever the authority shall acquire the private right-of-way or other property of a public utility used or useful in its service to the public. It shall before requiring the removal of the existing structures and appliances, provide a new location for the said structures and appliances, and upon the completion of relocation, reimburse the public utility for the cost thereof in the manner provided in section 8(a) above.

(c) Title to any property acquired by an authority through eminent domain shall be an absolute ownership or fee simple title unless a lesser title shall be designated specifically in the eminent domain proceedings. Real and personal property of any kind whatever belonging to a public utility corporation providing transportation or transportation related services, may be acquired without the approval of the Public Utility Commission: Provided, however, That in all cases involving the facilities of a railroad, any operations of which extend beyond the metropolitan area, the exercise of the power of the authority under this paragraph shall be subject to the jurisdiction of that commission under sections 409, 410 and 411 of the Public Utility Law.[3]

(d) No property owned or used by the United States, the Commonwealth, any political subdivsion thereof, or any

3. Sections 1179, 1180, 1181 of this title.

body politic and corporate organized as an "authority" under any law of the Commonwealth or by any agency of any of them, nor property used for burial purposes or places of public worship, shall be taken under the right of eminent domain without the consent of the owner or user thereof.

(e) Before exercising the power of eminent domain, reasonable efforts shall be made by the authority to achieve the desired result through negotiation.

(f) The power of eminent domain conferred herein shall be exercised by the authority, when authorized by resolution of the board, in the following manner:

(1) Jurisdiction and Venue.

The court of common pleas shall have exclusive jurisdiction of all eminent domain proceedings instituted by the Authority. Such proceedings shall be brought in the court of common pleas of the county in which the property to be condemned is located, or, if the property is located in two or more counties, then in the court of common pleas in any one of the counties. In the latter case where proceeding is commenced in the court of one county, all subsequent proceedings regarding the same property shall be brought in the same county.

(2) Condemnation of Title; Declaration of Taking.

(.1) Condemnation shall be effected by the filing in court of a declaration of taking, with such security as may be required by the court, and, thereupon, the title which the authority is to acquire in the property condemned, shall pass to the Authority.

(.2) The declaration of taking shall be in writing and executed by the persons authorized

by the board to act for the authority; shall be captioned as a proceeding in rem and shall contain the following:

(i) The name and address of the Authority;

(ii) A specific reference to this section of this act, under which the condemnation is authorized;

(iii) A specific reference to the resolution by which the declaration of taking was authorized by the board, including the date when such action was taken and the place where the record thereof may be examined;

(iv) A brief description of the purpose of the taking;

(v) A description or plan of the property taken sufficient for the identification thereof, specifying the county and any other municipality wherein the property taken is located;

(vi) A statement of the nature of the title acquired;

(vii) A statement specifying where a plan showing the condemned property may be inspected in a county in which the property taken or any part thereof is located;

(viii) A statement of how just compensation has been made or secured.

(3) Security Required.

(.1) Bond.

The authority shall file with the declaration of taking its bond without surety to the Common-

wealth, for the use of the owner or owners of the property, interests condemned, the condition of which shall be that the authority shall pay such damages as shall be determined by law.

(.2) Insufficient Security.

The court, upon preliminary objections of the condemnee, may require the authority to give such additional security as the court may deem proper.

(4) Recording Notice of Condemnation.

The authority, upon filing its declaration of taking, shall on or before the first business day thereafter, lodge a record of notice thereof in the office for the recording of deeds in the county or counties in which the property is located. The notice shall contain the court, term and number and the date of filing of the declaration of taking, as well as a description of the property taken, sufficient for the identification thereof and the name or names of the owner or owners of the property interests condemned, as reasonably known to the authority, and shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor, and the authority as grantee. The recorder shall receive as a fee the sum of five dollars ($5.00) for recording each notice and twenty-five cents (25¢) for each name indexed.

(5) Notice to Condemnee.

(.1) Within twenty (20) days after the filing of the declaration of taking, the authority shall give written notice of the filing thereof to the condemnee.

(.2) The notice shall be served within or without the Commonwealth, by any competent adult,

in the same manner as a complaint or writ of summons in assumpsit, or by first class, certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

(.3) The notice to be given the condemnee shall include:

(i) A copy of the declaration of taking, including the date of filing and the court, term and number thereof;

(ii) A statement that the condemnee's property has been condemned and to the extent and for the purpose set forth in the declaration of taking;

(iii) A statement that if the condemnee wishes to challenge the power or the right of the authority to appropriate the condemned property or the sufficiency of the security, or the procedure followed by the authority or the declaration of taking, he must file preliminary objections within twenty (20) days after service of said notice, where service was personal or by mail, or within thirty (30) days after service by publication and posting.

(.4) The authority shall file proof of service of said notice.

(6) Preliminary Objections.

(.1) Within twenty (20) days after being served with notice of condemnation where service was personal or by mail or within thirty (30) days after service by publication and posting the condemnee may file preliminary objections to the declaration of taking. The court, upon cause shown, may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging:

(i) The power or right of the authority to appropriate the condemned property;

(ii) The sufficiency of the security;

(iii) Any other procedure followed by the authority; or

(iv) The Declaration of Taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(.2) All preliminary objections shall be raised at one time and in one pleading and shall state specifically the grounds relied upon. They may be inconsistent and a copy thereof shall be served upon the authority within forty-eight (48) hours after filing.

(.3) The court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment to or direct the filing of a more specific declaration of taking.

(7) Petition for Appointment of Viewers.

Subsequent to the expiration of the time for filing

preliminary objections or the determination by the court of questions raised by such objections and the filing of a more specific declaration of taking, the authority or the condemnee may file a petition with the court for appointment of viewers to ascertain just compensation for any or all of the property included in the declaration of taking.

(8) Appointment of Viewers; Notice.

(.1) Upon the filing of the petition, the court shall promptly appoint three (3) viewers who shall view the premises, hold hearings and file a report.

(.2) The viewers shall promptly give written notice of their appointment to the authority and to all named condemnees setting forth the time and place of the view which shall be not less than twenty (20) days nor more than ninety (90) days from the date of said notice. Notice of subsequent hearings shall be given by not less than ten (10) days written notice.

(.3) Service of notice shall be in the same manner as provided for service of notice of the filing of the declaration of taking. Proof of service and the manner of same shall be attached to the viewers' report.

(.4) At the initial hearing the viewers shall ask all parties for information concerning the names and addresses of any persons who may have an interest in the property to be condemned and who have not been notified concerning the hearing. If any such persons are disclosed, the viewers shall adjourn the hearing to allow such notice to such persons.

(9) Furnishing of Information to Viewers.

The authority and condemnee shall furnish the viewers with such information as in the opinion of the viewers may be necessary for the proper determination of just compensation. All plans required for this purpose shall be supplied at the expense of the authority.

(10) Powers of Viewers.

The viewers shall have power to administer oaths and affirmations, to compel the attendance of witnesses, the production of books and documents, and to adjourn the proceedings from time to time. All the viewers shall act, unless prevented by sickness or other unavoidable cause; but a majority of the viewers may hear, determine, act upon and report all matters relating to the view for which they were appointed.

(11) Report of Viewers; Contents.

The viewers shall file a report which shall include in brief and concise paragraph form:

(.1) The date of their appointment as viewers and of the declaration of taking;

(.2) A statement of all notices issued by them with proof of service to be attached;

(.3) A statement of the extent and nature of the interest condemned, together with a copy of any pertinent plan or other document descriptive thereof;

(.4) A schedule of damages awarded or benefits assessed, to and by whom payable, and for which property, separately stated as to the various elements of damage including severance damages, if any;

(.5) Their rulings on any written requests for conclusion of law submitted to them;

(.6) Such other matters as they may deem relevant.

(12) Inability to Agree.

If a majority of the viewers are unable to agree on a decision, three new viewers shall be appointed by the court upon application of any interested party.

(13) Reports of Viewers; Notice of Filing.

(.1) Ten (10) days before the filing of their report the viewers shall mail a copy thereof to all parties or their attorneys of record, with notice of the date of the intended filing and that the report shall become final unless an appeal therefrom is filed within thirty (30) days from the date the report is filed. Prior to the filing of their report they may correct any errors therein and give notice thereof to the persons affected.

(.2) A report may be filed as to one or more of the properties involved in a multiple condemnation. The viewers may combine in one report two or more properties referred to them under separate petitions provided such properties are included in the same declaration of taking. Each such report shall be final as to the property or properties included therein and subject to separate appeal.

(14) Appeals; Time of Taking; Consolidation.

(.1) Any party aggrieved by the decision of the viewers may appeal to the court of common pleas within thirty (30) days from the filing of the report. The appeal shall raise all objections

of law or fact to the veiewer's report. The appeal shall be signed by the appellant or his attorney or his agent and no verification shall be required. Any award of damages or assessment of benefits, as the case may be, as to which no appeal is taken within thirty (30) days, shall become final as of course and shall constitute a final judgment.

(.2) The court, on its own motion, or on application of any party in interest, may consolidate separate appeals involving only common questions of law as one proceeding.

(.3) If a condemnee having less than the entire interest in the condemned property appeals the award to him, the authority shall have an additional fifteen (15) days to appeal the entire award.

(15) Appeals; Contents.

(.1) The appeal shall set forth:

(i) The name of appellant;

(ii) A brief description or identification of the property involved and the condemnee's interest therein;

(iii) A reference to the proceedings appealed from and the date of the filing of the viewers' report;

(iv) Objections, if any, to the viewers' report, other than to the amount of the award;

(v) A demand for trial, if desired. If the appellant desires a jury trial, he shall at the time of filing the appeal, endorse thereon, or file separately, a written demand for jury

trial, signed by him or counsel. If no demand for jury trial is made by the appellant, any other party may file a written demand for jury trial within fifteen (15) days after being served with a copy of the appeal. If no party makes a demand for a jury trial as set forth herein, the right to jury trial shall be deemed to have been waived and the court shall try the case without a jury.

(.2) The appellant shall serve a copy of the appeal on all other parties within five (5) days after filing the same. Proof of service of a copy of the appeal shall be filed by the appellant.

(.3) No other pleadings shall be required and the cause shall be deemed at issue.

(16) Disposition of Appeal.

(.1) All objections, other than to the amount of the award, raised by the appeal, shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order.

(.2) The amount of damages shall be tried by jury, unless waived.

(.3) At the trial of the case, the condemnee shall be the plaintiff and the authority shall be the defendant.

(17) Severance and Special Damages; Allocation.

(.1) Upon appeal from an award of viewers, the court, upon the request of the plaintiff, shall,

after the jury, or the court (if the trial is without jury), has returned its general verdict, make a specific finding and allocation as to the amount of the general verdict attributable to severance damages to the part of the property not taken.

(.2) The jury or the court, in a trial without a jury, shall make specific findings as to the portion of the award or judgment allocated to items of special damages authorized by this act or any other provision of law.

(18) Costs of Proceedings.

All taxable costs, including filing fees, jury fees, statutory witness fees and mileage, expenses of preparing plans under section 8(f)(9) above, the expense of transporting the judge and jury to view the condemned property, and such other costs as the court, in the interests of justice may allow, shall be paid by the authority, unless the court, in a special case, should deem that the interest of justice requires an apportionment of the costs in some other manner amongst the parties.

(19) Waiver of Viewers' Proceedings.

The authority and condemnee may, by written agreement filed with the court, waive proceedings before viewers and proceed directly to the said court on agreed issues of law or fact. The proceedings thereafter shall be the same as on appeal from a report of viewers.

(20) Distribution of Award; Liens.

(.1) If the authority is unable to determine proper distribution of the damages, it may, without

payment into court, petition the court to distribute the damages and shall furnish the court with a schedule of proposed distribution.

(.2) Notice of the filing of the petition and schedule of proposed distribution shall be given to all condemnees, mortgagees, judgment creditors and other lienholders, as shown in the proposed schedule, in such manner as the court may by general rule or special order direct. The court may hear the matter or may appoint a master to hear and report or may order any issue tried by the court and jury as may appear proper under all the circumstances. The court shall thereafter enter an order of distribution of the fund.

(21) Payment into Court; Distribution.

(.1) Upon refusal to accept payment of the damages, or if the party entitled thereto cannot be found, or if for any other reason the damages cannot be paid to the party entitled thereto, the court upon petition of the authority which shall include a schedule of proposed distribution, may direct payment of the damages and costs into court in full satisfaction thereof.

(.2) The court thereafter upon petition of any party in interest shall distribute such funds or any other funds deposited in court to the persons entitled thereto in accordance with the procedure in section 8(f)(20), but if no petition is presented within a period of five (5) years of the date of payment into court, the court shall order the fund or any balance remaining to be paid to the Commonwealth without escheat. No fee shall be charged against these funds.

(.3) When the court believes that the person who is entitled to the fund is not a resident of the United States, its territories or possessions, and would not have the actual use, enjoyment or control of the funds distributable to him the court shall have the power and authority:

(i) To direct only such payments to the person entitled thereto as the court deems proper; or

(ii) To pay it through the Department of Revenue into the State Treasury without escheat to be held for the benefit of the person entitled thereto. The court which directed payment to the State Treasury, upon petition of the person entitled to such funds, and upon being satisfied that petitioner will have the actual possession, benefit, use, enjoyment or control thereof, shall enter a decree directing the Board of Finance and Revenue to make repayment with interest at two percentum per annum from the date the funds were paid into the State Treasury to the date of repayment.

(22) Joint Claims Required; Apportionment of Damages.

The claims of all persons having any interest in the same property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall fix, first, the total amount of damages for the property, and second, the apportionment of the total amount of damages between or among the several claimants therefor.

(23) Appeal to Supreme or Superior Court.

Either party may appeal to the Supreme or Superior Court from any final order or judgment of the court of common pleas within forty-five (45) days from the entry thereof.

(24) Just Compensation and Measure of Damages.

(.1) The following factors shall be considered in any determination of just compensation for any property interest condemned by the Authority:

(i) The condemnee shall be entitled to the difference between the fair market value of a condemnee's entire property interest immediately before the taking and as unaffected thereby, except as otherwise provided herein, and the fair market value of his remaining property interest after the taking and as affected thereby.

(ii) Fair market value may reflect the present use of the property and its highest and best reasonably available use, the presence and value of fixtures and other pertinent factors. It shall not reflect any change in value which is shown to be substantially due to the general knowledge of imminence of condemnation.

(iii) In any condemnation by the authority of the entire assets, or a substantial portion of the assets, of a public utility engaged in mass passenger transportation, where it is contemplated that a substantial portion of the employees of such utility shall be transferred to and become employees of the authority, the viewers, in measuring the fair market value of

the property taken shall give due consideration to the effect on such value of the amount of the legal liability accrued under any pension or retirement system, plan or program, existing immediately prior to such condemnation, with respect to employees in the employ of the utility at that time, as well as any employees who shall have previously retired or employees who may reasonably be expected to retire within any then existing contract period; and such liability shall be assumed by the authority.

(25) Revocation of Condemnation.

The authority, at any time before the proceedings are ended, may relinquish all or any part of the property taken, by filing a declaration of relinquishment in the court, whereupon title shall revest in the condemnee as of the date of the filling of the declaration of taking. Notice of said relinquishment shall be recorded in the office of the recorder of deeds of the county in which the property taken is located, with the authority as the grantor and the condemnee as the grantee, and the notice of said relinquishment shall be served on the condemnee in the same manner as provided for service of the declaration of taking. Where condemned property is relinquished, the condemnee shall be entitled to the damages sustained by him including costs, expenses and reasonable attorney's fees and such damages shall be assessed by the court, or the court may refer the matter to viewers to ascertain and assess the damages sustained by the condemnee, whose award shall be subject to appeal as provided in this act. The authority and the condemnee without the filing of a

declaration of relinquishment provided herein, may, by agreement, effect a revesting of title in the condemnee.

(26) Right to Enter Property Prior to Condemnation.

Prior to the filing of the declaration of taking, the authority or its employees or agents, shall have the right to enter upon any land or improvement which it has the power to condemn, in order to make studies, surveys, tests, soundings and appraisals. Any actual damages sustained by the owner of property entered upon by the authority for the foregoing reasons shall be paid by the authority and shall be assessed by the court or viewers or by agreement in the same manner as provided in paragraph 8(f) (24). 1963, Aug. 14, P.L. 984, § 8.

§ 2009. Use of ways occupied by other passenger utilities.

The authority shall not have the right to use any street or public way presently occupied by a public utility engaged in local passenger transportation, for a competing purpose, without the agreement of such public utility. 1963, Aug. 14, P.L. 984, § 9.

§ 2010. Loans, bonds and certificates; trust indentures.

(a) The authority shall have the continuing power to borrow money for the purpose of acquiring any transportation system (including any cash funds of such system reserved to replace worn out or obsolete equipment and facilities) and for acquiring necessary cash working funds or for acquiring, constructing, reconstructing, extending or improving its transportation system or any part thereof and for acquiring any property and equipment useful for the construction, reconstruction, extension, improvement or

operation of its transportation system or any part thereof, and for any other of its corporate purposes. The authority shall also have the continuing power to issue and deliver evidence of its indebtedness in payment in whole or in part for all or any part of any transportation system, or any bonds, shares or other securities of any corporation owning or operating any such system, or any franchises, property, equipment or interests acquired or to be acquired by the authority. For the purpose of evidencing the obligation of the authority to repay any money borrowed as aforesaid, or to pay any indebtedness incurred in connection with the acquisition of all or any part of any transportation system, or any bonds, shares or other securities of any corporation owning or operating any such system, or any franchises, property, equipment or interests as aforesaid, the authority may, pursuant to resolution adopted by the board, from time to time, issue and dispose of its interest-bearing bonds or certificates and may also, from time to time, issue and dispose of its interest-bearing bonds or certificates to refund any bonds or certificates at maturity or pursuant to redemption provisions or at any time before maturity with the consent of the holders thereof. All such bonds and certificates shall be payable solely from the revenues or income to be derived from the transportation system including grants, gifts or contributions from the Federal, State or local governments, their agencies or instrumentalities, or any other source; may bear such date or dates; may mature at such time or times not exceeding forty years from their respective dates; may bear interest at such rate or rates; may be in such form; may carry such registration privileges; may be executed in such manner; may be payable at such place or places; may be made subject to redemption in such manner and upon such terms with or without premium as is stated on the face thereof; may be authenticated in such manner and may contain such

terms and covenants, all as may be authorized by the board. Notwithstanding the form or tenor thereof, and in the absence of an express recital on the face thereof that it is non-negotiable, all such bonds and certificates shall be negotiable instruments. Pending the preparation and execution of any such bonds or certificates, temporary bonds or certificates may be issued with or without interest coupons as may be authorized by the board.

(b) To secure the payment of any or all of such bonds or certificates and for the purpose of setting forth the covenants and undertaking of the authority in connection with the issuance thereof and the issuance of any additional bonds or certificates payable from such revenue or income as well as the use and application of the revenue or income to be derived from the transportation system, the authority may execute and deliver a trust indenture or indentures. A remedy for any breach or default of the terms of any such trust indenture by the authority may be by mandamus or injunction proceedings, or other proceeding in law or in equity in any court of competent jurisdiction to compel performance and compliance therewith, but the trust indenture may prescribe by whom or on whose behalf such action may or may not be instituted.

(c) Under no circumstances shall any bonds or certificates issued by the authority or any other obligation of the authority be or become an indebtedness or obligation of the Commonwealth or of any political subdivision thereof.

(d) Before any such bonds or certificates (excepting refunding bonds or certificates and bonds or certificates issued in payment in whole or in part of all or any part of any transportation system, or any bonds, shares or other securities of any corporation owning or operating any such system, or any franchises, property, equipment or inter-

ests) are sold, the entire authorized issue or any part thereof shall be offered for sale as a unit after advertising for bids at least three times in a daily newspaper of general circulation published in the metropolitan area, the last publication to be at least ten days before bids are required to be filed. Copies of such advertisement may be published in any newspaper or financial publication in the United States. All bids shall be sealed, filed and publicly opened as authorized by the board, and the bonds or certificates shall be awarded to the highest responsible bidder or bidders therefor. The authority shall have the right to reject all bids and readvertise for bids in the manner provided for in the initial advertisement. However, if no bids are received, such bonds or certificates may be sold at not less than par value and accrued interest without further advertising within sixty days after the bids are required to be filed pursuant to any advertisement. The foregoing requirements of competitive bidding shall not be applicable to bonds or certificates or other evidences of indebtedness issued in payment in whole or in part for all or any part of any transportation system, or any bonds, shares or other securities of any corporation owning or operating any such system, or any franchises, property, equipment or interests acquired or to be acquired by the authority, nor shall such requirements be applicable to notes issued by the authority which mature is not more than three years from date of issue and which are issued in anticipation of financing over a longer term.

(e) The bonds of the authority created under the provisions of this act, the sale or transfer thereof, and the income therefrom shall, at all times, be free from taxation for state or local purposes under any law of this Commonwealth or political subdivision thereof.

(f) Neither the board members of the authority nor any person executing the bonds shall be liable personally on any such bonds by reason of the issuance thereof.

(g) Bonds of the authority which are sold for cash may be sold at not less than ninety-five per cent of par and accrued interest. In case any of the officers of the authority, whose signatures appear on any bonds or coupons shall cease to be officers before the delivery of such bonds, their signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if such officers had remained in office until such delivery.

(h) Any bond reciting in substance that has been issued by the authority to accomplish the public purposes of this act, shall be conclusively deemed in any suit, action or proceeding involving the validity or enforceability of such bond or security therefor to have been issued for such purpose. 1963, Aug. 14, P.L. 984, § 10, as amended 1966, Feb. 2, P.L. (1965) —, No. 587, § 1.

§ 2011. Acquisition of equipment; agreements and leases.

(a) The authority shall have power to purchase equipment such as cars, trolley buses and motor buses and may execute agreements, leases and equipment trust certificates in the form customarily used in such cases appropriate to effect such purchase, and may dispose of such equipment trust certificates: Provided, however, That wherever feasible, such certificates shall be offered for public sale in a manner similar to that provided for the sale of bonds in this act. All money required to be paid by the authority under the provisions of such agreements, leases and equipment trust certificates, shall be payable solely from the revenue or income to be derived from the transportation system and from grants and loans as provided elsewhere in this act. Payment for such equipment or rentals there-

for may be made in installments and the deferred installments may be evidenced by equipment trust certificates payable solely from such revenue, income, grants or loans and title to such equipment shall not vest in the authority until the equipment trust certificates are paid.

(b) The agreement to purchase may direct the vendor to sell and assign the equipment to a bank or trust company duly authorized to transact business in the Commonwealth as trustee for the benefit and security of the equipment trust certificates and may direct the trustee to deliver the equipment to one or more designated officers of the authority and may authorize the trustee simultaneously therewith to execute and deliver a lease of the equipment to the authority.

(c) The agreements and leases shall be duly acknowledged before some person authorized by law to take acknowledgments of deeds and in the form required for acknowledgments of deeds, and such agreements, leases and equipment trust certificates shall be authorized by Resolution of the Board and shall contain such covenants, conditions and provisions as may be deemed necessary or appropriate to insure the payment of the equipment trust certificates from the revenue or income to be derived from the transportation system.

(d) The covenants, conditions and provisions of the agreements, leases and equipment trust certificates shall not conflict with any of the provisions of any trust indenture securing the payment of bonds or certificates of the authority.

(e) An executed copy of each such agreement and lease shall be filed in the office of the Secretary of the Commonwealth who shall be entitled to receive one dollar for each such copy filed with him, and which filing shall consti-

tute notice to any subsequent judgment creditor or any subsequent purchaser. Each vehicle so purchased and leased shall have the name of the owner and lessor plainly marked upon both sides thereof followed by the words "Owner and Lessor".

(f) An authority shall have power by its resolution, trust, indenture, mortgage, lease or other contract to confer upon any obligees holding or representing a specified percentage in bonds, or holding a lease, the right, in addition to all rights that may otherwise be conferred, upon the happening of an event of default as defined in such resolution or instrument, by suit, action or proceeding in any court of competent jurisdiction:

(1) To obtain the appointment of a receiver of any real property of the authority and of the rents and profits therefrom. If such receiver be appointed, he may enter and take possession of such real property, operate the same and collect and receive all revenues or other income thereafter arising therefrom, and shall keep such moneys in a separate account and apply the same in accordance with the obligations of the authority as the court shall direct.

(2) To require the authority, and the board members thereof, to account as if it and they were the trustees of an express trust. 1963, Aug. 14, P. L. 984, § 11.

§ 2012. Provisions of bonds; trust indentures

(a) In connection with the issuance of bonds or the incurring of obligations under leases, and in order to secure the payment of such bonds or obligations, the authority, in addition to its other powers, shall have power:

(1) To pledge all or any part of its gross or net revenues to which its right then exists or may thereafter come into existence.

(2) To mortgage all or any part of its real or personal property then owned or thereafter acquired.

(3) To covenant against pledging all or any part of its revenues, or against mortgaging all or any part of its real or personal property to which its right or title exists or may thereafter come into existence, or against permitting or suffering any lien on such revenues or property to covenant with respect to limitations on its right to sell, lease or otherwise dispose of any of its real property, and to covenant as to what other or additional debts or obligations may be incurred by it.

(4) To covenant as to the bonds to be issued and as to the issuance of such bonds, in escrow, or otherwise, and as to the use and disposition of the proceeds thereof, to provide for the replacement of lost, destroyed, or mutilated [1] bonds, to covenant against extending the time for the payment of its bonds or interest thereon, and to redeem the bonds and to covenant for their redemption and to provide the terms and conditions thereof.

(5) To covenant, subject to the limitations contained in this act as to the amount of revenues to be raised each year, or other period of time, as well as to the use and disposition to be made thereof, to create or to authorize the creation of special funds for debt service or other purposes, and to covenant as to the use and disposition of the moneys held in such funds.

(6) To prescribe the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds, the holders of which must consent thereto, and the manner in which such consent may be given.

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1. Enrolled bill reads "mutilated".

(7) To covenant as to the use of any or all of its real or personal property, to warrant its title, and to covenant as to the maintenance of its real and personal property, the replacement thereof, the insurance to be carried thereon, and the use and disposition of insurance moneys.

(8) To covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition or obligation, and to covenant and prescribe, in the event of default, as to terms and conditions upon which any or all of its bonds or obligations shall become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived.

(9) To vest in a trustee, or the holders of bonds, or any proportion of them, the right to enforce the payment of the bonds or any covenants securing or relating to the bonds, to vest in a trustee the right, in the event of a default by the authority, to take possession and use, operate and manage any real property and to collect the rents and revenues arising therefrom and to dispose of such moneys in accordance with the agreement of the authority with such trustee, to provide for the powers and duties of a trustee and to limit liabilities thereof, and to provide the terms and conditions upon which the trustee or the holders of bonds or any proportion of them may enforce any covenant or rights securing or relating to the bonds.

(10) To make covenants other than, and in addition to, the covenants herein expressly authorized; to make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or in the absolute discretion of the authority, as will tend to accomplish the purposes of this act, by making the bonds more marketable notwithstanding that such cove-

nants, act or things may not be enumerated herein. 1963, Aug. 14, P. L. 984, § 12.

§ 2013. Bonds and certificates to be legal investments.

The Commonwealth and all political subdivisions and public bodies and public officers of any thereof, all banks, bankers, trust companies, saving banks and institutions, building and loan associations, saving and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business and all executors, administrators, guardians, trustees and other fiduciaries may leggally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds or certificates issued pursuant to this act, it being the purpose of this section to authorize the investment in such bonds or certificates of all sinking, insurance, retirement, compensation, pension and trust funds, whether owned or controlled by private or public persons or officers. 1963, Aug. 14, P.L. 984, § 13.

§ 2014. Investment and reinvestment of funds.

The authority shall have the power to invest and reinvest any funds held in reserve or sinking funds not required for immediate disbursement (a) in the following securities as defined in the Fiduciaries Investment Act of 1949, as amended:[1] Obligations of the United States and of the Commonwealth of Pennsylvania as more fully defined in section 3, subsections (1) and (2) of such act; Obligations of Federal organizations as defined in section 4 of such act; and (b) for sinking fund purposes only, in bonds or certificates of the authority at not to exceed their par value or their call price plus accrued interest; and to sell any of the

1. Section 821.1 et seq. of Title 20, Decedents' and Trust Estates.

securities acquired under clause (a) whenever the funds are needed for disbursement. Such investment or reinvestment of any fund shall not be in conflict with any provisions of any trust agreement securing the payment of bonds or certificates of the authority. 1963, Aug. 14, P.L. 984, § 14.

§ 2015. Administrative board.

The governing and administrative body of the authority shall be a board, to be known as the transportation board of the metropolitan area, consisting of members to be appointed as hereinafter provided, who, except for the appointee of the Governor, must be residents of the metropolitan area. No board member shall be allowed any fees, perquisites or emoluments, reward or compensation for his services as a member or officer of the authority, but he shall be reimbursed for actual expenses incurred by him in the porfermance of his duties. 1963, Aug. 14, P.L. 984, § 15.

§ 2016. Appointment of board members.

(a) At any time after the effective date of this act,

(1) The Governor may appoint as a member of the board one person, who may be an ex-officio appointee from among the various officials in the government of the Commonwealth, and whose term as a board member shall run concurrently with that of his Commonwealth position, if any, or the term of the appointing Governor, whichever is shorter.

(2) The county commissioners in each county, and, in any county of the first class containing a city of the first class, the Mayor, with the approval of the city council, may appoint two (2) persons for each county to serve as board members, for staggered initial terms, two of which terms,

but not two from the same county, shall expire on the first day of September, beginning in 1964 and continuing until all initial terms shall have expired. Specific expiration dates for the several terms shall be apportioned among the counties in such manner as shall be agreed upon by the appointing powers.

(b) At the expiration of the term of any board member, his successor shall be appointed by the same power who appointed him, for a term of five (5) years from such expiration date.

(c) The appointing powers shall certify their respective appointments whether initial or subsequent, to the Secretary of the Commonwealth. Within thirty (30) days after certification of his appointment and before entering upon the duties of his office, each member of the board shall take and subscribe the constitutional oath of office and file it in the office of the Secretary of the Commonwealth. 1963, Aug. 14, P.L. 984, § 16.

§ 2017. Resignation and removal of members; vacancies.

Members of the board shall hold office until their respective successors have been appointed and have qualified. The appointing power may remove any member of the board appointed by him or them, but only in case of incompetency, neglect of duty or malfeasance in office. No member shall be thus removed except after having been given a copy of the charges against him and an opportunity to be publicly heard, at a place in the metropolitan area, in person or by counsel, in his own defense upon not less than ten days' written notice. In case of failure to qualify within the time required or of abandonment of his office or in case of death, conviction of a felony or removal from office, his office shall become vacant. A member shall be deemed to have abandoned his office upon failure to attend

any regular or special meeting of the board, without excuse approved by resolution of the board, for a period of four months, or upon removal of his residence from the metropolitan area. Each vacancy shall be filed for the unexpired term by appointment in like manner and with like regard as to the place of residence of the appointee as in case of expiration of the term of a member of the board. A member removed for incompetency, neglect of duty or malfeasance in office shall have the right to appeal such removal to the court of common pleas of the county for which he was appointed, but only on the ground of error of law or manifest and flagrant abuse of discretion. 1963, Aug. 14, P.L. 984, § 17.

§ 2018. Meetings, quorum, approval of resolutions; election of chairman.

(a) Regular meetings of the board shall be held in the metropolitan area at least once in each calendar month except July or August, the time and place of such meetings to be fixed by the board. A majority of the board shall constitute a quorum for the transaction of business. All action of the board shall be by resolution and the affirmative vote of a majority of all the members shall be necessary for the adoption of any resolution: Provided, however, That no action by the board to which an express objection has been made, pursuant to this section, by a board member or members representing a county or counties having one-third or more of the population of the metropolitan area, as determined by the most recent decennial census, shall be carried unless supported at a subsequent regular meeting of the board by the votes of at least three-quarters of the membership of the board. In case of disagreement between members representing the same county, each member shall be deemed to represent one-half of the population of that county.

(b) The board shall elect from among its members a chairman and a vice-chairman, who shall serve for terms of one (1) year and until their successors shall have been elected and qualified, and shall perform such duties as the board shall, by resolution, determine.

(c) All resolutions and all proceedings of the authority and all documents and records in its possession shall be public records and open to public inspection, except such documents and records as shall be kept or prepared by the board for use in negotiations, actions or proceedings to which the authority is or may become a party. 1963, Aug. 14, P. L. 984, § 18.

§ 2019. Secretary, treasurer, oath, bond.

The board shall appoint a secretary and a treasurer, neither of whom shall be a member of the board, to hold office during the pleasure of the board, and shall fix their duties and compensation. The secretary shall not be engaged in any other business or employment during his tenure of office as secretary of the board. Before entering upon the duties of their respective offices, they shall take and subscribe the constitutional oath of office. The treasurer and such other officers and employees of the authority, and such members of the board as the board may determine, shall execute corporate surety bonds, conditioned upon the faithful performance of their respective duties. A blanket form of surety bond may be used for this purpose if the board deems such procedure to be practical and prudent. The obligation of the sureties shall not extend to any loss sustained by the insolvency, failure or closing of any national or state bank wherein the treasurer has deposited funds if the bank has been approved by the board as a depository for these funds. The oaths of office and the surety bond or bonds shall be filed in the principal office of the authority. 1963, Aug. 14, P.L. 984, § 19.

§ 2020. Deposit of funds, checks and drafts; security collateral.

(a) All funds deposited by the treasurer in any bank shall be placed in the name of the authority and shall be withdrawn or paid out only by check or draft upon the bank signed by the treasurer and countersigned by the chairman of the board. The board may designate any of its members or any officer or employee of the authority to affix the signature of the chairman and another to affix the signature of the treasurer to any check or draft for payment of salaries or wages and for the payment of any other obligation of not more than $2,500.00.

(b) Whenever the business of the authority requires the affixing of the signature of any officer or employee of the authority, the use of a facsimile signature, when expressly authorized by resolution of the board, shall have the same force and effect as an original signature.

(c) All bank balances to the extent the same are not insured shall be continuously secured by a pledge of direct obligations of United States of America, of the Commonwealth or of any municipality or municipalities in the metropolitan area, having an aggregate market value, exclusive of accrued interest at all times at least equal to the balance on deposit in such bank. Such securities shall either be deposited with the treasurer of the authority or be held by a trustee or agent satisfactory to the authority. All banks and trust companies are authorized to give such security for such balances. 1963, Aug. 14, P.L. 984, § 20.

§ 2021. Signatures of officers ceasing to hold office.

In case any officer whose signature appears upon any check, draft, bond, certificate or interest coupon issued pursuant to this act, ceases to hold his office before the delivery

thereof to the payee or the purchaser of any bond or certificate, his signature nevertheless shall be valid and sufficient for all purposes with the same effect as if he had remained in office until delivery thereof. 1963, Aug. 14, P.L. 984, § 21.

§ 2022. General manager.

The board, before engaging in transportation operations, shall appoint a general manager. The general manager shall have management of the properties and business of the authority and the employees thereof, subject to the general control of the board; shall direct the enforcement of all resolutions, rules and regulations of the board and shall perform such other duties as may be prescribed from time to time by the board. With the approval of the board, he shall appoint such officers and employees to be under the general manager as the board shall determine. 1963, Aug. 14, P.L. 984, § 22.

§ 2023. Legal division; chief counsel.

(a) The board, before engaging in transportation operations, shall establish a legal division which shall be administered by a chief counsel, who shall be an attorney-at-law admitted to practice before the Supreme Court of the Commonwealth, and who shall be appointed by the board to serve at its discretion. The legal division, in addition to the chief counsel, shall consist of such attorneys and other employees as the board from time to time shall determine to be necessary, and who shall be appointed by the chief counsel with the approval of the board. The legal division shall administer the legal affairs of the board. The legal division shall administer the legal affairs of the board, shall prosecute and defend, settle or compromise all suits or claims for and on behalf of the authority, and shall

advise the board and its officers in all matters relating to their official duties.

(b) The chief counsel may, from time to time, with the approval of the board, retain such other legal counsel on such terms and for such purposes as shall be deemed by the board to be necessary or desirable. Nothing in this section or in the preceding section shall be construed so as to limit the power of the legal or other officers of the counties and municipalities comprising the metropolitan area to act in behalf of the board in their official capacities when requested so to do by resolution of the board. 1963, Aug. 14, P.L. 984, § 23.

§ 2024. Other employees.

The board shall provide for the employment of such other officers, agents, consultants, engineers and employees as may be necessary for the performance of the work of the authority. The board shall have the right to bargain collectively and enter into agreements with labor organizations. The board shall recognize and be bound by existing labor union agreements where they exist between labor unions and transportation companies that are acquired, purchased, condemned or leased by the board. It shall designate their duties and require bonds of such of them as the board may designate. The compensation of the general manager, chief counsel, comptroller, chief engineer and all other officers, attorneys, consultants, agents and employees shall be fixed by the board. With the exception of the secretary, any of the foregoing may be appointed, retained, hired or employed on a part-time basis and may be engaged in other business or professional activities; provided, that no employee of the authority shall hold any other office in or be an employee of the Federal, State or any county or municipal government except an office or employment with-

out compensation or an office in the Military Reserve or National Guard. 1963, Aug. 14, P.L. 984, § 24, as amended 1966, Feb. 2, P.L. (1965)—, No. 587, § 1.

§ 2025. Classification of positions and employments; discharge or demotion of officers or employees; hearings; seniority; pensions and retirement.

(a) The board shall classify all the offices, positions and grades of regular employment required, excepting that of the chairman of the board, the general manager, secretary, treasurer, chief counsel and other attornyes in the legal division, with reference to the duties thereof and the compensation fixed therefor and adopt rules governing appointments to any of such offices or positions on the basis of merit and efficiency. No discrimination shall be made in any appointment or promotion because of race, creed, color or political or religious affiliations. No officer or employee shall be discharged or demoted except for just cause.

(b) The board may abolish any office or reduce the force of employees for lack of work or lack of funds, but in so doing, the officer or employee with the shortest service record in the class and grade to which he belongs shall be first released from service and shall be reinstated in order of seniority, when additional force of employees is required. Seniority shall be considered a working condition. No qualified person shall be laid off if a transfer to another job, division or department within the transportation system can be arranged.

(c) Pensions and Retirement.

There shall be established and maintained by the authority a pensions and retirement system to provide for payments when due under such system or as modified from time to time by resolution of the board. For this purpose,

both the board and the participating employees shall make such periodic payments to the established system as may be determined by such resolution. The board may provide for participation by its employees in the social security program or, in lieu of social security payments required to be paid by private corporations engaged in similar activity, shall make payments into such established system at least equal in amount to the amount so required to be paid by such private corporations, or make such other arrangements as will accomplish the same purpose. Provisions shall be made by the board for all officers and employees of the authority appointed pursuant to this act to become, subject to reasonable rules and regulations, members and beneficiaries of the pensions and retirement system, with uniform rights, privileges, obligations and status as to the class in which such officers and employees belong. Members and beneficiaries of any pensions or retirement system established by a transportation system acquired by the authority shall continue to have rights, privileges, benefits, obligations and status with respect to such previously established system. To achieve the purposes set forth in this paragraph, the board shall make appropriate rules and regulations and from time to time shall obtain competent actuarial advice. 1963, Aug. 14, P.L. 984, § 25.

§ 2026. Transfers of facilities or things of value to any authority.

Any county, municipality, school district, corporation or person, or group, may and they are hereby authorized to sell, lease, lend, grant, convey, transfer or pay over to any authority, with or without consideration, any project or any part or parts thereof, or any interest in real or personal property or any funds available for building construction or improvement purposes, including the proceeds of bonds

previously or hereafter issued for building construction or improvement purposes, or any money or thing of value, including services, which may be used by the authority in the construction, acquisition, improvement, maintenance or operation of any project or for any other of its corporate purposes, any other law to the contrary notwithstanding. 1963, Aug. 14, P.L. 984, § 26.

§ 2027. Compacts to finance operations and particular projects.

(a) The counties and municipalities in any metropolitan area shall be and they are hereby authorized to enter into a compact or compacts among themselves and/or with the authority to provide for meeting the authority's capital or operating budget by appropriations, annual or otherwise, of such sums and in such proportions as may be agreed upon in such compact to be paid by each signatory party thereto. The obligation incurred thereby shall be for the term as set forth in the compact without regard to the provisions of any law, ordinance or regulation to the contrary, and shall constitute a commitment and obligation, binding and absolute, on the part of each such signatory party, to appropriate and pay over the necessary funds in accordance therewith. The said operating budget shall include all sums of money necessary for the formation and organization of any authority and all items of operating expenses in connection with said authority, as well as necessary funds for planning and research appropriate and consistent with the purport of this act and any compact entered into pursuant to this act.

(b) Such a compact may also provide for the financing of a particular mass transportation project in such manner as shall be provided for in the compact.

(c) Whenever a party signatory to such a compact thereby expresses its approval of the budget for financing a particular project, this shall then constitute a commitment and obligation, binding and absolute, on the part of such party signatory to appropriate the necessary funds in accordance therewith.

(d) No commitment or obligation involving the payment of moneys [1] to or on behalf of such authority shall exist in any instance on the part of any county or other municipality within the metropolitan area unless and until such commitment or obligation shall first have been expressly and lawfully undertaken and assumed by such county or municipality. 1963, Aug. 14, P.L. 984, § 27.

§ 2028. Contracts, procurement and sale of property; concessions; advertisement; bidding.

(a) Except in the purchase of unique articles or articles which, for any other reason, cannot be obtained in the open market and except as hereinafter provided, competitive bids shall be secured before any purchase or sale, by contract or otherwise is made or before any contract is awarded for construction, alterations, supplies, equipment, repairs or maintenance or for rendering any services to the authority other than professional services; and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder; or a sale to the highest responsible bidder. No purchase of any unique article or other articles which cannot be obtained in the open market shall be made without express approval of the board where the amount involved is in excess of $5,000.00.

(b) Purchases and Sales Over $5,000.00.

All purchases and sales in excess of $5,000.00 shall be awarded after advertising in a local newspaper of general

1. Enrolled bill reads "monies".

circulation in the metropolitan area at least two weeks prior to the bid opening. Bids shall be publicly opened and read aloud at a date, time, and place designated in the invitation to bid. Invitations to bid shall be sent at least one week prior to the bid opening to at least three potential bidders who are qualified technically and financially to submit bids, or in lieu thereof a memorandum shall be kept on file showing that less than three potential bidders so qualified exist in the market area within which it is practicable to obtain bids.

(c) Purchases and Sales Under $5,000.00 and Over $1,000.00.

Written price quotations from at least three qualified and responsible vendors shall be obtained for all purchases and sales under $5,000.00 and over $1,000.00, or in lieu thereof, a memorandum, approved by the board, shall be kept on file showing that less than three vendors so qualified exist in the market area within which it is practicable to obtain quotations except as hereinafter provided.

(d) Purchases and Sales Under $1,000.00.

Purchases or sales under $1,000.00 may be negotiated with or without competitive bidding under sound procurement procedures as promulgated and established by the board.

(e) Emergency Purchase.

Competitive bidding requirements may be waived if it is determined by the general manager, or in such other manner as the board may, by regulation, provide, that an emergency directly and immediately affecting customer service, or public health, safety or welfare requires immediate delivery of supplies, materials, equipment or services: Provided, however, That a record of circumstances explain-

ing the emergency shall be submitted to the board at its next regular meeting and thereafter kept on file.

(f) Concessions.

All concessions granted by the authority for the sale of products or the rendition of services for a consideration on authority property shall be awarded only pursuant to written specifications after competitive bidding and to the highest responsible bidder in a manner similar to that required by the preceding paragraph relating to contracts for procurement involving an expenditure of more than $5,000.00; provided, that the foregoing requirement for competitive bidding shall not apply to any concession which has been granted by a transportation system acquired by the authority and which by the terms of the agreement granting it will terminate within one year from date of the acquisition of the transportation system by the authority, nor to any concession involving the estimated receipt by the authority of less than $1,000.00 over the period for which the concession is granted.

(g) Sale or Lease of Authority-Owned Property.

Contracts for the sale or lease of real property owned by the authority shall be awarded after competitive bidding as shown in paragraph (b) "Purchases and Sales Over $5,000.00", except where contract is entered into with the Commonwealth or any political subdivision or agency or instrumentality thereof or with the United States government or any agency or instrumentality thereof.

(h) Negotiated Contracts.

Contracts for the management of authority-owned property, such as bus routes or subway systems may be negotiated and awarded by an affirmative vote of one more than a majority of all members of the board.

(j) Fragmentation of Requirements to Avoid Public Building.

Requirements shall not be split into parts for the purpose of avoiding the provisions of this section.

(k) Rejection of Bids.

The authority shall have the right to reject any or all bids or parts of any or all bids, whenever, in the opinion of the board, such rejection is necessary for the protection of the interests of the authority. In every such case, a record shall be made, setting forth the reason for such rejection, which record shall thereafter be kept on file.

(l) Board Rules.

The board shall adopt rules and regulations to effectuate the provisions of this section. 1963, Aug. 14, P.L. 984, § 28, as amended 1966, Feb. 2, P.L. (1965)—, No. 587, § 1.

§ 2029. Conflict of interest.

Every member of the board and every employee of the authority who knowingly has any interest, direct or indirect, in any contract to which the authority is, or is about to become, a party, or in any other business of the authority, or in any firm or corporation doing business with the authority, shall make full disclosure of such interest to the board. Failure to disclose such an interest shall constitute misconduct, for which a board member may be removed by the appointing power, or an employee may be discharged or otherwise disciplined at the discretion of the board. Whenever, in the opinion of the board, any such interest on the part of any board member or any employee, shall constitute a conflict of interest detrimental to the authority, the board shall require such action or absention by such board member or employee as it may deem necessary or desirable to protect the interests of the authority. The board shall

promulgate such rules and regulations as may be necessary to effectuate the purposes of this section. 1963, Aug. 14, P.L.—, No. 450, § 29.

§ 2030. Fiscal operating year; budget; capital program.

The board shall establish a fiscal operating year. At least ninety days prior to the beginning of the first full fiscal year after the creation of the authority and, annually thereafter, the board shall cause to be prepared and submitted to it a tentative operating budget and a tentative capital budget for the ensuing fiscal year. The tentative budgets shall be considered by the board and, subject to any revision and amendments as may be determined, shall be adopted at least thirty days prior to the first day of the ensuing fiscal year as the budgets for that year. The board shall establish such rules as are necessary for proper observance of the budgets. Simultaneously with the adoption of the budget the board shall adopt a tentative capital program covering the ensuing six years. 1963, Aug. 14, P.L. 984, § 30.

§ 2031. Financial statements and reports; audit

(a) As soon after the end of each fiscal year as is feasible, the board shall cause to be prepared and printed a report and financial statement of the authority's operations for the previous year and of its assets and liabilities. A reasonably sufficient number of copies of such report shall be printed for distribution to persons interested upon request. A copy of such report shall be filed with the Secretary of the Commonwealth, the county clerk of each county in the metropolitan area, and the clerk of each municipality which has granted rights to the authority by ordinance and a copy of such report shall be addressed to and mailed to the mayor and city council or the governing body of such

municipality. The board from time to time shall mail to the persons and offices specified in the preceding sentence copies of such interim financial reports as may be prepared by the authority, copies of all by-laws, rules and regulations, and amendments thereto, and copies of the annual financial budgets.

(b) The board shall appoint in due time each year a firm of independent certified public accountants as auditors who shall examine the books, records and accounts of the authority for the purpose of auditing and reporting upon its financial statement for such year. The report of such auditors shall be appended to such financial statement. 1963, Aug. 14, P. L. 984, § 31.

§ 2032. Transfer of records by public utility commission

In case the authority acquires the plant, equipment, property and rights in property of any public utility used or useful in the operation of a transportation system, the Pennsylvania Public Utility Commission shall transfer and deliver to the board, upon its demand, in writing, all books, papers and records in control of said commission affecting such public utility exclusively. 1963, Aug. 14, P. L. 984, § 32.

§ 2033. Depreciation reserve

(a) There shall be established and maintained a reserve for depreciation reasonably estimated to be adequate to care for the retirement (due to exhaustion, wear and tear and obsolescence) of property at cost. The amount necessary to be credited to the reserve each year for such purposes shall be charged to operations.

(b) If, by any covenant of the authority, there is required to be established out of revenues any reserve for

debt, retirement or property replacements or additions, the amount of the annual provision credited to the reserve as required by this section, shall be considered to have been made, to the extent needed, for or toward the corresponding annual requirement of any such covenant. 1963, Aug. 14, P. L. 984, § 33.

§ 2034. Damage reserve fund

The board shall withdraw from the gross receipts of the authority and charge to operating expenses such an amount of money as, in the opinion of the board, shall be sufficient to provide for the adjustment, defense and satisfaction of all suits, claims, demands, rights and causes of action, and the payment and satisfaction of all judgments entered against the authority for damage caused by injury to or death of any person and for damage to property resulting from the construction, maintenance and operation of the transportation system, and the board shall deposit such moneys in a fund to be known and designated as damage reserve fund. The board shall use the moneys in the damage reserve fund to pay all expenses and costs arising from the adjustment, defense and satisfaction of all suits, claims, demands, rights and causes of action, and the payment and satisfaction of all judgments entered against the authority for damages caused by injury to or death of any person and for damage to property resulting from the construction, maintenance and operation of the transportation system. At any time, and from time to time, the board may obtain and maintain insurance coverage or protection, partially or wholly, insuring or indemnifying the authority against loss or liability on account of injury to, or death of any person, and for damage to property resulting from the construction, maintenance and operation of the transporta-

tion system. The cost of obtaining and maintaining such insurance shall be paid out of the moneys in the damage reserve fund. All moneys received from such insurance coverage or protection shall be paid into the damage reserve fund. 1963, Aug. 14, P. L. 984, § 34.

§ 2035. Special funds; common cash account and auxiliary short term investment portfolio; reserves

(a) The authority, pursuant to resolutions adopted from time to time by the board, may establish and create such other and additional special funds as may be found desirable by the board and in and by such resolutions may provide for payments into all special funds from specified sources with such preferences and priorities as may be deemed advisable and may also by any such resolutions provide for the custody, disbursement and application of any moneys in any such special funds consistent with the provisions of this act, and consistent with good accounting practice with due reference to the uniform system of accounts for transportation operations maintained by either the Interstate Commerce Commission or the Pennsylvania Public Utilities Commission.

(b) To the extent practicable the authority may establish a common cash account and auxiliary short-term investment portfolio as a depository for all cash of the general or special funds: Provided, That the interest of each fund therein be clearly recorded and preserved at all times: And provided further, That there shall not be any commingling of assets where prohibited by any covenant of the authority.

(c) Nothing contained in this act shall be construed as to prevent the prudent accumulation of reserve funds by the authority. 1963, Aug. 14, P.L. 984, § 35.

§ 2036. Limitation of actions against authority.

Within six months from the date that any injury was received, or any cause of action accrued, any person who is about to commence any civil action in any court against the authority for damages on account of any injury to his person shall file in the office of the secretary of the board, and also in the office of the chief counsel for the authority, either by himself, his agent, or attorney, a statement in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date, and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any. If the notice provided for by this section is not filed as provided, any civil action commenced against the authority more than six months after the date of injury, shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing. 1963, Aug. 14, P.L. 984, § 36.

§ 2037. Investigations and subpoenas.

(a) The board may investigate all means of transportation and the management thereof, the enforcement of its resolutions, rules and regulations, and the action, conduct and efficiency of all officers, agents and employees of the authority. In the conduct of such investigations, the board may hold public hearings on its own motion and shall do so on complaint or petition of any municipality in the metropolitan area. Each member of the board shall have power to administer oaths and the secretary, by order of the board, shall issue subpoenas to secure the attendance and testimony of witnesses and the production of books and

papers relevant to such investigations and to any hearing before the board or any member thereof, or any officers' committee or employees' committee, appointed by the board to hear any complaint of an officer or employee who has been discharged or demoted.

(b) Any court of record of this Commonwealth, or any judge thereof, either in term time or vacation, upon application of the board or any member thereof may, in his discretion, compel the attendance of witnesses, the production of books and papers, and giving of testimony before the board or before any member thereof, or any officers' committee or employees' committee, appointed by the board by attachment for contempt or otherwise, in the same manner as the production of evidence may be compelled before said court. 1963, Aug. 14, P.L. 984, § 37.

§ 2038. Aid from federal government.

In addition to the powers conferred upon any authority by other provisions of this act, such authority is empowered to borrow money or accept money or accept grants or other financial assistance from the Federal government, for or in aid of its operations. It is the purpose and intent of this act to authorize the authority, and the authority is so authorized, to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in any of its operations. Such things may include without limiting the generality of the foregoing: the power to change or revise rates, fares and charges; to make relocation payments to families, businesses and nonprofit organizations; to provide an area-wide transportation plan or program for the development of a comprehensive and coordinated mass transportation system for the metropolitan area; to carry out research, development and demonstration projects; to provide a share of the cost

of any project; all as may be required by any Federal law or by the requirements of any Federal agency authorized to administer any Federal program of aid to any mass transportation program. 1963, Aug. 14, P.L. 984, § 38.

§ 2039. Exemption from taxation.

(a) The effectuation of the authorized purposes of any authority created under this act shall and will be, in all respects, for the benefit of the people of the Commonwealth, for the increase of their commerce and prosperity and for the improvement of their health and living conditions, and since such authority will be performing essential governmental functions in effectuating such purposes, it shall not be required to pay any property taxes or assessments, of any kind or nature whatsoever, now in existence or to be enacted in the future, whether imposed by the Commonwealth or by any political subdivision thereof, or by any other taxing authority, and the bonds issued by such authority, their transfer, and the income therefrom (including any profits made on the sale thereof), shall at all times be free from taxation within the Commonwealth. 1963, Aug. 14, P.L. 984, § 39.

§ 2040. Limitation of powers.

The Commonwealth does hereby pledge to and agree with any person, firm or corporation, or Federal agency subscribing to or acquiring the bonds to be issued by any authority for the construction, extension, improvement or enlargement of any project or part thereof, that the Commonwealth will not limit or alter the rights hereby vested in such authority until all bonds at any time issued, together with the interest thereon, are fully met and discharged. The Commonwealth does further pledge to and

agree with the United States and any other Federal agency that, in the event that any Federal agency shall construct or contribute any funds for the construction, extension, improvement or enlargement of any project or any portion thereof, the Commonwealth will not alter or limit the rights and powers of the authority in any manner which would be inconsistent with the continued maintenance and operation of the project, or the improvement thereof, or which would be inconsistent with the due performance of any agreements between the authority and any such Federal agency, and the authority shall continue to have and may exercise all powers herein granted, so long as the same shall be necessary or desirable for the carrying out of the purposes of this act and the purposes of the United States in the construction or improvement or enlargement of the project or such portion thereof. 1963, Aug. 14, P.L. 984, § 40.

§ 2041. Severability.

If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act, and the application of such provision to other persons or circumstances, shall not be affected thereby, and to this end, the provisions of this act are declared to be severable. 1963, Aug. 14, P.L. 984, § 41.

§ 2042. Repealed.

All acts or parts of acts, whether general, special or local, inconsistent herewith, are hereby repealed. 1963, Aug. 14, P.L. 984, § 42.

§ 2043. Effective date.

This act shall take effect January 15, 1964. 1963, Aug. 14, P.L. 984, § 43.

APPENDIX H.

Pennsylvania Constitution, Art. 17, § 9.

§ 9. Street railways.

No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities.

APPENDIX I.

Act of April 15, 1907, P.L. 80, § 1, 67 P.S. § 1256.

It shall and may be lawful for any city, borough or township, of the one part, and any street passenger railway company, surface, elevated or underground, or motor power company leasing and operating the franchises and property of such company within the limits of such cities, boroughs or townships, of the other part, to enter into contracts with each other affecting, fixing, and regulating the franchises, powers, duties, and liabilities of such companies, and the regulations and respective rights of the contracting parties. Such contracts may, inter alia, provide for payment by the companies to the local authorities, in lieu of the performance of certain duties or the payment of license fees or charges imposed in favor of such city, borough or township by the charters of the respective companies or by any general law or ordinance, for the appointment by the local authorities of a certain number of persons to act as directors of such company, in conjunction with the directors elected by the stockholders of such company, and, further, may provide for the ultimate acquisition by the local authorities, upon terms mutually satisfactory, of the leaseholds, property and franchises of the contracting companies.

APPENDIX J.

Act of May 5, 1933, P.L. 364, Art. VII, 15 P.S. § 2852-701.

A. Unless its articles otherwise provide, a business corporation shall have the right to purchase or otherwise acquire, and to hold and own its own shares which are not subject to redemption.

B. All purchases by a business corporation of its own shares which are not subject to redemption however, whether direct or indirect, shall be subject to the limitations contained in subsection F hereof, and shall not be made except:

(1) To the extent of its unrestricted and unreserved earned surplus, or

(2) If it has no such earned surplus, to the extent of its unrestricted capital surplus, but only pursuant to the prior affirmative vote obtained within one year of such purchase of the holders of at least a majority of its outstanding shares of each class, whether or not entitled to vote thereon by the provisions of the articles, or

(3) If it has no such earned surplus, to the extent of the aggregate of its unrestricted capital surplus, and, if it has no such capital surplus, to the extent of its unrestricted stated capital but only if such purchase shall be for the purpose of eliminating fractional shares, collecting or compromising indebtedness to the corporation, or paying dissenting shareholders entitled to payment for their shares under the provisions of this act.

C. A business corporation may effect, subject to the other provisions of this act, the retirement of its redeemable shares by redemption or by purchase.

D. A business corporation may acquire its own shares on conversion thereof into or exchange thereof for other shares of the corporation, and may apply thereto the aggregate of its capital surplus and stated capital represented by the shares so acquired. In every such case, the corporation shall, by resolution of its board of directors, cancel the shares so acquired and shall file a statement of cancellation as required by section 709 of this act. If the resolution so provides, such corporation may thereby reduce the number of shares of the class so cancelled which the corporation is authorized to issue by the number of shares so cancelled. If the articles prohibit the reissue of such shares, such resolution shall so provide.

E. Notwithstanding any limitations contained in this act, an open-end investment company may, subject to the limitations contained in subsections F(1) and F(2) hereof, by resolution of its board of directors, purchase its own shares and apply thereto the amount of stated capital and capital surplus represented thereby, and thereupon its stated capital and capital surplus shall be reduced by such amounts.

F. (1) No purchase of its shares shall be made at a time when a business corporation is insolvent or when such purchase would render the corporation insolvent.

(2) No purchase of its own shares shall be made which would reduce the remaining net assets of a business corporation below the aggregate preferential amount payable in the event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation.

(3) To the extent that earned surplus or capital surplus or stated capital is used as the measure of a business

corporation's right to purchase its own shares, such surplus and stated capital shall be restricted so long as such shares are held as treasury shares. Upon the disposition of any such shares, the restriction shall be removed to the extent of the consideration received therefor, and upon the cancellation thereof to the extent of its stated capital and capital surplus reduced thereby, and any remaining surplus and stated capital restricted by the purchase thereof shall be eliminated.

APPENDIX K.

Act of May 28, 1937, P.L. 1053, Art. III, § 301, as Amended, 66 P.S. § 1141.

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission: Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility.

APPENDIX L.

Act of July 11, 1957, P.L. 711, § 703, 15 P.S. § 2852-703.

The board of directors of a business corporation may, from time to time, distribute to its shareholders in partial liquidation, out of unrestricted capital surplus of the corporation a portion of its assets, in cash or property, subject to the following provisions:

(1) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent;

(2) No such distribution shall be made unless such distribution shall have been authorized by the prior affirmative vote obtained within one year of such distribution of the holders of at least a majority of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of its articles;

(3) No such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all classes of shares entitled to preferential dividends prior to dividends on the shares to the holders of which such distribution is to be made shall have been fully paid;

(4) No such distribution shall be made to the holders of any class of shares which would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation;

(5) Each such distribution, when made, shall be identified as a distribution in partial liquidation and the amount per share disclosed to the shareholders receiving the same concurrently with the distribution thereof.

APPENDIX M.

Paragraph Eleventh of 1907 Agreement Between Philadelphia Rapid Transit Company and City of Philadelphia.

Eleventh. The City reserves the right to purchase all the property, leaseholds and franchises of the Company, subject to all indebtedness now existing or hereafter lawfully created hereunder, upon July 1st, 1957, or upon the first day of any July thereafter by serving six months' notice on the Company of its intentions so to do, and upon paying to the Company upon the date named in said notice an amount equal to par for its capital stock then outstanding, to wit: the thirty million ($30,000,000) dollars of capital now authorized plus any additional capital stock issued with the consent of the City hereunder. The fund in the sinking-fund, if not theretofore paid over to the City, shall be available to the City for the purpose of making or assisting in making the said payment for the property of the Company. This contract shall continue in force until such right is exercised, but whenever the right is exercised the City shall succeed to and become the owner, subject as aforesaid, of all the franchises, leaseholds, rights, property and privileges theretofore vested in the Company, and the City may either operate the same or lease the right to operate the same for such terms and upon such condition as it may deem fit. The rights of the City under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger railway systems and may become a bidder for such rights.

APPENDIX N.

Order of Pennsylvania Public Utility Commission, November 14, 1955.

PENNSYLVANIA PUBLIC UTILITY COMMISSION.

SECURITIES CERTIFICATE No. 1855.

Securities Certificate of Philadelphia Transportation Company in the matter of the issuance of 1,720,184 shares, common capital stock, $10 par value aggregating $17,201,840.

ORDER.

BY THE COMMISSION, November 14, 1955:

Securities Certificate No. 1855 having been filed with the Commission and full review and consideration of the matters involved therein having been had, and having found that the issuance or assumption of securities in the amount, of the character, and for the purpose or purposes therein proposed, is necessary or proper for the present and probable future capital needs of the public utility, the Commission is of opinion that the Securities Certificate should be registered

THEREFORE,

IT IS ORDERED:

1. That Securities Certificate No. 1855 be and is hereby registered.
2. That the registration of this securities certificate shall not be construed to imply any guaranty or obli-

gation on the part of the Commonwealth of Pennsylvania as to such securities, nor shall it be taken as requiring the Commission, in any proceeding brought before it for any purpose, to fix a valuation which shall be equal to the total of such securities, or to approve or prescribe a rate which shall be sufficient to yield a return thereon.

3. That the financial program proposed in the securities certificate be consummated within forty-five (45) days from the date hereof and that the Commission be informed to that effect within ten (10) days thereafter, and that the company furnish the Commission with a certified copy of the entry or entries recording the assets acquired, liabilities assumed and the securities here registered for issuance in exchange therefor.

4. That the surplus created by the issuance of the $17,201,840 par value common stock here registered for issue in exchange for the company's presently outstanding $15,047,680 par value participating preferred and $7,170,050 par value common stock shall be recorded in Account 448.1—Paid-in Surplus—$5,015,890, and said surplus shall be available for use only for such purposes as may hereafter be authorized by the Commission.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

(signed) LEON SCHWARTZ,
Chairman.

ATTEST:

(signed) WILLIAM P. ROAN,
Secretary.

(SEAL OF PENNSYLVANIA PUBLIC UTILITY COMMISSION)

APPENDIX O.

Exchange of letters between John McShain and Mayor James H. J. Tate.

"November 2, 1964

"The Honorable James H. J. Tate
Mayor of Philadelphia
Philadelphia 7, Pennsylvania

"Dear Jim:

"I was very much pleased that we were able to get together on Friday, as I felt the meeting was a very constructive one. I am sure you know that Al Lyons, Erric Von Stark, Casimir Sienkiewicz, Richardson Dilworth and myself are making every possible effort to bring about a conclusion of the negotiations in connection with the Septa Group purchasing the P.T.C.

"Following your departure, we discussed at length the lease on the Broad Street Subway, and I have promised Richardson Dilworth and Casimir Sienkiewicz that I will communicate with them the early part of next week, at which time we hope to have available all the pertinent information regarding bonds, etc., and the financial picture relative to the P.T.C. I see no reason whatever if we are able to arrive at a satisfactory figure with the negotiators for Septa, that this entire transaction could not be concluded before the 15th of November, and if such is the case there will be no necessity of renewing the lease on the Broad Street Subway.

"As I mentioned, however, in our meeting on Friday, it would be very wise if Al Lyons and his associates would negotiate the contract with Quill and his group for a new

labor agreement, for I am sure he will be able to make a far better deal than the members of Septa. In addition, it would be wise not to disclose the fact that we have high hopes of concluding the negotiations in the immediate future. This report may get to the ears of Mr. Quill, and I am sure his demands will be far greater if he feels he is dealing with Septa rather than the P.T.C. Company.

"You can be sure I will keep you abreast of all future activities.

"With kind personal regards,"

"November 13, 1964

"Mr. John McShain,
17th and Spring Garden Streets,
Philadelphia, Pennsylvania.

"Dear John:

"Thank you for your letter of November 2nd. I am happy to hear that you are hopeful of a successful conclusion in your negotiations for the acquisition of the Philadelphia Transportation Company by the Southeastern Pennsylvania Transportation Authority. This is basically a problem to be worked out by the P.T.C. and SEPTA, and the City will cooperate where it can. I am sure you are aware of this.

"As far as the lease agreements are concerned, I was distressed to learn that you had deferred approving the suggestion of Al Lyons and Fred Corleto that the leases be continued on their present terms and conditions. Since the time is short, the City has no choice but to explore alternative possibilities.

"With respect to the 'Labor' agreement, I hope that the P.T.C. and SEPTA can cooperate in the negotiations. Again, this is basically a problem for the P.T.C. or possibly

SEPTA, as equitable owner. The City will, nevertheless, cooperate in any way that it may be helpful to avoid another crippling strike.

"If a determination is not soon made as to the renewal of the lease agreements, it will, of course, be necessary for the City to explore with the transportation union the terms and conditions for operating the system.

"We will defer taking a direct approach to the transportation union until November 23rd.

"With all good wishes and kindest regards, I remain

"Sincerely yours,

"/s/ JAMES H. J. TATE,
"Mayor."

JHJT:rg

APPENDIX P.

Issues Raised in Lower Courts.

This Appendix supplements the Statement at page 18 of the Petition with respect to the time and manner of raising the federal questions in the proceedings below.

Question number 1 (Petition, p. 4) was raised as soon as possible after SEPTA and the City asked the court to restrain petitioners from filing suit in a federal court and before the temporary restraining order was issued. The issue was briefed by petitioners, citing *Donovan v. Dallas,* 377 U.S. 408 (1964), before the preliminary injunction was entered. This decision was explicitly considered, but rejected, by Judge Spaeth in his opinion accompanying the "preliminary injunction" (Appendix, pp. 225a-26a). On appeal to the Pennsylvania Supreme Court, petitioners also raised this point at pages 27-32 in the Brief for Appellants in No. 229 (Appendix Q), but the Supreme Court merely affirmed Judge Spaeth's order without opinion (Appendix, p. 41a).

As to Questions 2-6 (Petition, pp. 4-8), petitioners raised their federal constitutional arguments in the Court of Common Pleas by requests for conclusions of law, paragraphs 19 and 20:

> "19. To require PTC to surrender its property to SEPTA for less than its *fair value* would deprive the PTC and its stockholders of their property without *due process* of law, in violation of the Constitutions of the United States and of Pennsylvania." (Emphasis added.)

"20. Neither the City nor SEPTA may change the terms of the City's contract with PTC to give the right to SEPTA to exercise the option without giving PTC the opportunity to bid which, under the law as it then existed, the contract gave it in the event of an assignment, without violating the Constitutions of the United States and of Pennsylvania."

Judge Spaeth's conclusions of law (Appendix pp. 186a-189a), neither adopted nor rejected these requests. Petitioners' exception to the failure to adopt those findings, as all others, was summarily dismissed (Appendix pp. 191a-94a). These claims were also briefed at length in Defendants' Brief in Support of Exceptions to the Decree Nisi (Appendix R). On Appeal to the Pennsylvania Supreme Court from the final decree or judgment, petitioners briefed their federal constitutional claims in their Brief for Appellants in No. 188. The required Statement of Questions Involved and PTC's argument is contained in Appendix S. These constitutional arguments were orally argued before all three courts.

PTC filed a timely petition for reargument with the Supreme Court of Pennsylvania raising these same federal questions. This petition was denied on September 26, 1967.

Petitioners Janney et al. filed Requests for Findings and Conclusions, and therein requested the court to find and conclude, inter alia, as follows:

"9. Under all the facts and circumstances of this case the plaintiffs' petition for a declaratory judgment must be and it is hereby denied and dismissed on the ground that if not denied and dismissed the defendants herein would be deprived of their rights under the Fifth Amendment of the Constitution of the United

States which provides, in pertinent part, that private property may not be taken for public use without payment of just compensation."

"10. Under all the facts and circumstances of this case the plaintiffs' petition for a declaratory judgment must be and it is hereby denied and dismissed on the ground that if not denied and dismissed the defendants herein would be deprived of their rights under the Fourteenth Amendment of the Constitution of the United States which provides, in pertinent part, that no State shall deprive any person of property without due process of law, and which incorporates the provisions of the Fifth Amendment of the Constitution of the United States which provides, in pertinent part, that private property may not be taken for public use without payment of just compensation."

The court did not expressly rule on these requests, whereupon Janney filed exceptions to the failure of the trial judge to adopt these findings and conclusions.

These exceptions duly came up for argument before the court of first instance, sitting *en banc,* as a three-judge court, and, after oral arguments, all exceptions were dismissed on the merits.

Thereafter, upon appeal to the Supreme Court of Pennsylvania petitioners raised the federal question in that court by including the question in the Statement of Questions Involved, as quoted below:

"STATEMENT OF QUESTIONS INVOLVED.

"3. Whether the final judgment and decree of the court below infringes Intervenors' federal rights un-

der the Fourteenth Amendment of the Constitution of the United States.

(Was not answered by the Court below; negatived in effect.)"

The Supreme Court of Pennsylvania did not expressly rule on the federal question, whereupon Janney, in due course, and in accordance with the rules of court, filed a Petition For Reargument, in which petitioners recited that.

"Joseph N. Janney, et al., intervening defendants above-named, pray that a reargment be heard in this case for the following reasons:

"1. The opinion of the court, filed on Thursday, July 27, 1967, contains no ruling on the federal question which was presented to the court by petitioners.

In petitioners' original brief, the third question in the Statement of Questions Involved (p. 2) was as follows:

"3. Whether the final judgment and decree of the court below infringes Intervenors' federal rights under the Fourteenth Amendment of the Constitution of the United States."

This point was argued in petitioners' brief, under a separate heading, at page 29.

The above-quoted Petition for Reargument was dismissed on the merits by entry of an order reading as follows: "Petition for Reargument denied."

The Supreme Court's opinion did not explicitly rule on these questions. Nevertheless petitioners' consistent attempts to raise their federal Constitutional claims are

sufficient to give this Court appellate jurisdiction by writ of certiorari. See *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 121-23 (1935).

APPENDIX Q.

Portion of PTC's Supreme Court Brief on the Preliminary Injunction.

C. The Injunction Against a Federal Court Action.

To support this part of his decree the trial judge rummaged through the notes of Assistant Secretary Tyson, taken at the December 20 board meeting (392a), which had been produced in court for examination pursuant to the order of the trial judge (151-2a), resurrected "corroborating evidence" of earlier directors' deliberations (393-4a), charged PTC's counsel with failing to deny that an enabling resolution was adopted by the Board (393a),[15] and then proclaimed his authority to protect the appellate jurisdiction of this Court, as well as his own jurisdiction, from a conjectural invasion by the federal court if PTC should file an action there. He violated both the principles of Pennsylvania equity law and the Supremacy Clause of the United States Constitution with this portion of his injunction. Moreover, the broadly phrased injunction against a state court action subjects PTC to the danger of being held in contempt even for bringing an ancillary or independent proceeding, such as a writ of prohibition or mandamus, to prohibit the court from enforcing its illegal order against a federal action.

In the first place there was no evidence before the court of any definitive corporate action to file a suit in the federal court, cf. *Vulcanized Rubber & Plastics Co. v.*

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15. He put upon PTC the burden of proving "at a further hearing" that "no resolution to file a federal court action was adopted" (395a).

Scheckter, 400 Pa. 405, 414-415 (1960), or, more importantly, any evidence that such a suit, if it ever were filed, could affect this Court's consideration of the pending appeal. Thus there was absolutely no basis for the trial judge's professed concern that his injunction was essential to protect this Court's jurisdiction (395a) over this *in personam* action.[16] Section 2283 of the Judicial Code prohibits a federal court from enjoining state court proceedings except "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments,"[17] and no injunction may be issued in *in personam* actions under the guise of its being in aid of the federal court's jurisdiction. *Oklahoma Packing Co. v. Gas Co.,* 309 U.S. 4, 8-9 (1939); *Jos. L. Muscarelle, Inc. v. Central Iron Mfg. Co.,* 328 F. 2d 791 (3d Cir. 1964); *Nongard v. Burlington County Bridge Commission,* 229 F. 2d 622, 624-25 (3d Cir. 1956).

The rule is that *in personam* actions may be prosecuted concurrently in both state and federal courts until a judgment is obtained in one court which is *res judicata* in the other because the courts have concurrent jurisdiction of such actions. In *in rem* proceedings, on the other hand, the state or federal court having custody of the property has exclusive jurisdiction to proceed. *Donovan v. City of Dallas,* 377 U.S. 408, 412-413 (1964); *Princess Lida v. Thompson,* 305 U.S. 456, 465-68 (1939); *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195 (1935); *Kline v. Burke Construction Co.,* 260 U.S. 226 (1922).

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16. This declaratory judgment action is an *in personam* action in which a decree has been entered against PTC as the successor to a party to the 1907 Agreement. Even if the action were for specific performance of that agreement, the proceeding would be *in personam* and not *in rem. Atlantic Seaboard Natural Gas Co. v. Whitten,* 315 Pa. 529 (1934); *Gallagher v. Rogan,* 322 Pa. 315 (1936).

17. 28 U.S.C. § 2283. Such an injunction may issue when "expressly authorized by the Act of Congress," but there is no such act which is applicable here.

It follows that even if PTC had actually instituted a federal action against SEPTA and the City, instead of just talking about it, this Court would be free to proceed to final judgment as it would if such an action had not been brought. In no circumstances could a federal action interfere with either the jurisdiction of this Court or of that of the court below.

Even if enjoining a federal court action might somehow aid this Court or the lower court in the exercise of their jurisdiction, the trial judge was totally without power to enjoin PTC from bringing an action in a federal court. *Donovan v. City of Dallas,* 377 U.S. 408 (1964).

In *Donovan v. City of Dallas, supra,* plaintiffs' state court action to restrain the issuance and selling of municipal bonds was dismissed and, on appeal, the dismissal was affirmed. Thereafter, some of the plaintiffs in the state court action instituted suit in the federal district court to enjoin issuance of the bonds. The bonds could not be issued so long as there was pending litigation challenging their validity. The state court issued a writ prohibiting the plaintiffs from pursuing the federal court action. The plaintiffs were held in contempt because they continued with the federal action and because they brought a separate action to enjoin the Supreme Court of Texas from interfering with the original federal court suit. The United States Supreme Court reversed this conviction for contempt, holding that the writ enjoining the federal suit was unlawful.

The Supreme Court said that, in the early history of our country, a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings except in proceedings *in rem* or *quasi in rem.* While Congress has seen fit to alter this rule by authorizing federal courts to restrain state court proceedings in some special circumstances, as when necessary to protect the federal court's jurisdiction (28

U. S. C. § 2283),[18] Congress "has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." 377 U.S. at 412-413. It also pointed out that the plaintiffs' right to institute suit in the federal court was "a right which is theirs by reason of congressional enactments passed pursuant to congressional policy," and that any claim that the judgment of a state court bars litigation of the same issues in the federal court must be decided by the federal court, and not by the state court. 377 U.S. at 412.

The trial judge purported to distinguish the *Donovan* case on the ground that since the litigation in the Texas court had proceeded to judgment, the court had no jurisdiction to protect (397-8a). That distinction makes no difference in the validity of the state court order. This Court held in *Trees v. Glenn*, 319 Pa. 487 (1935), that the Court of Common Pleas of Allegheny County could restrain re-litigation in another state court of issues concluded by its judgment which was entered more than nine years before suit was filed in the second court. What made the order unlawful in *Donovan* was that it was an attempt to restrain resort to a *federal* court. The Supreme Court in *Donovan* expressly recognized that Congress, in empowering federal courts to restrain state court proceedings in aid of their jurisdiction or to effectuate their judgments (28 U.S.C.

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18. The desire to avoid friction between state and federal courts is so strong that the Supreme Court of the United States held in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), that a federal court could not prevent the re-litigation in state courts of matters concluded by its judgment. The federal court now has that power "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. *Williams v. Pacific Royalty Co.*, 247 F.2d 672 (10th Cir. 1957); *Lee v. Terminal Transport Co.*, 282 F.2d 805 (7th Cir. 1960), *cert. den.*, 365 U.S. 828 (1961); *Allied Mutual Ins. Co. v. Roberson*, 306 F.2d 130 (4th Cir. 1962).

§ 2283), has not relaxed the rule that state courts are completely without power to restrain federal court proceedings in *in personam* actions. 377 U.S. at 412-413.

Fundamental constitutional principles prohibit state courts from enjoining a party from resorting to the federal courts. Article VI of the Constitution of the United States binds judges of every state to recognize the supremacy of the Constitution of the United States and the laws enacted by Congress under the Constitution. Article III, Section 2, provides that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and the laws of the United States. Congress has given the United States District Courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This grant of power creates a federal right in every citizen to invoke that power.

As the Supreme Court said in *Donovan,* the right to pursue "federal-court remedies" is a right "granted by Congress and cannot be taken away by the State," and state courts are "without power to take away this federal right by contempt proceedings or otherwise." *Donovan v. City of Dallas,* 377 U.S. 408, 413-414 (1964). PTC's right to invoke federal-court remedies is a right protected by the United States Constitution. *Terral v. Burke Construction Co.*, 257 U.S. 529, 532 (1922); *Railway Co. v. Whitton's Administrator,* 13 Wall. 270, 286-287 (1871). In *Garrity v. New Jersey,* U.S. (January 16, 1967), 35 U.S. Law Week 4135, the Supreme Court characterized this right as one of those "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." 35 U.S. Law Week at 4137.

Since Congress has not limited the power of the United States District Courts by granting to state courts the power to enjoin federal court proceedings to protect their jurisdiction, the trial judge was wholly without power to restrain PTC from exercising its right to pursue federal remedies. That is what the Supreme Court of the United States held in the *Donovan* case, and the trial judge could not ignore the Constitution, the Congress and the Supreme Court of the United States, in order to "protect" this Court's jurisdiction whether it needed protection or not.

APPENDIX R.

Portion of PTC's Brief Before the Court of Common Pleas en Banc.

Statement of the Case.

On July 14, 1966 the Honorable Edmund B. Spaeth, Jr. filed his Opinion, Findings of Fact, Conclusions of Law and Decree Nisi in this declaratory judgment proceeding. Defendants filed their exceptions on August 2, 1966. A hearing thereon by the Court en banc is scheduled for August 24, 1966. This brief is in support of defendants' exceptions.[1]

Reference is made to the Trial Judge's Opinion for a history of the case and a general statement of the nature of this proceeding. To that history the following facts should be added: On June 2, 1966, the day before the trial ended, the Trial Judge announced that he had an obligation to decide this case by July 15, 1966 (N.T. 2123). Defendants submitted their brief on June 27, 1966. Oral argument was heard the next day. Additional briefs were filed thereafter. On July 14, 1966, 16 days after receiving our brief and hearing oral argument, the Trial Judge filed his Opinion, Findings of Fact, Conclusions of Law and Decree Nisi consisting of 157 pages plus an "Abstract of the Case". This was a fitting climax to the relentless race against time which has characterized this litigation. In rejecting an offer of proof which defendants' counsel described as "very essential to our case" (N.T. 2095), the

1. Since the Trial Judge seemed to assume that the defendants waived all points not briefed or argued, it should be stated now that the failure to brief or argue any exception are due to limitations of space and time and should not be construed as a waiver. Defendants do not waive or withdraw any of their exceptions.

Trial Judge assigned as one of his reasons that "to enter into an evaluation proceeding now might cause delay that certainly would be contrary to the Supreme Court's most imperative directive that this case proceed forthwith" (N.T. 2112-3).

The net effect of the Trial Judge's decision is to permit Southeastern Pennsylvania Transportation Authority ("SEPTA"), an agency of the Commonwealth of Pennsylvania, to confiscate the property of the Philadelphia Transportation Company ("PTC") and to take it from the Company and its stockholders against their will at a bargain price many millions of dollars less than the current fair value of their property. This would deprive the PTC and its stockholders of their property without due process of law in violation of their constitutional rights under the Constitutions of the United States and the Commonwealth of Pennsylvania.

The issue is not whether PTC's transportation system should be privately or publicly owned, or whether SEPTA should be permitted to acquire the PTC. Since both the City and SEPTA have the power to acquire the PTC system through condemnation, the right of eminent domain having been granted to SEPTA by the statute under which it was created [Metropolitan Transportation Authorities Act of 1963 ("SEPTA Act"),[2] and since SEPTA has insisted that it has a "mandate" and a "public directive" to acquire the PTC transit system, the only practical question is *what price* must SEPTA pay PTC and its thousands of public stockholders for the PTC system?

Whether SEPTA acquires property through eminent domain or through purchase, the SEPTA Act requires SEPTA to pay "fair market value." Indeed, it is inconceivable that the Legislature could have intended that any

2. Act of August 14, 1963, P. L. 984, §§ 1, 8, 66 Purdon's Pa. Stat. Ann. (Supp. 1965) §§ 2001, 2008.

acquisition "by purchase" should be at a price different from "fair market value". This conclusion is particularly persuasive where the "purchase" is enforced against the "seller," as in this case. Even if the Legislature did not expressly so provide, the enabling legislation should be so construed to avoid a violation of the Constitution of the United States and of the Commonwealth of Pennsylvania.

What has happened here is transparent. SEPTA thinks it has found in the purchase option, purportedly granted many years ago to the City of Philadelphia by PTC's predecessor, and then purportedly assigned to SEPTA by the City in 1965, a neat device through which it can "grab" the PTC property at a bargain price. Otherwise, SEPTA would not hesitate to negotiate with PTC a purchase price equal to or approximating "fair market value." This would eliminate the need for a condemnation proceeding and for this declaratory judgment proceeding.

Since SEPTA has chosen instead to pursue a bargain purchase through an old option purportedly granted to the City, the validity, interpretation and assignment of that option are issues which are to be adjudicated in this proceeding.

The SEPTA Act grants SEPTA the power to acquire all or part of any transportation system in the Philadelphia metropolitan area [3] by purchase or condemnation and to operate it as part of the Authority's transportation system. In purchasing privately owned property the Act directs SEPTA to consider the same value factors as would apply in condemnation. Those factors require the payment of an amount equal to fair value of the property. If a substantial portion of the utility's existing employees are to be employed by the Authority, SEPTA is to give due consideration to the effect which the amount of any legal liability

3. Philadelphia and all counties any part of which is within twenty miles of it.

accrued under the utility's pension or retirement system would have on the fair value of the property. The Act requires SEPTA to assume the pension liability in these circumstances. SEPTA Act §§ 4(d)(5), 8(f)(24), 66 P.S. 66 2004(d)(5), 2008(f)(24).

SEPTA's negotiations for a purchase of PTC in accordance with the mandate of the SEPTA Act were unsuccessful because PTC would not agree to sell for the low purchase price which SEPTA wanted. In these negotiations SEPTA was ever mindful of the option and of the bargain price. SEPTA did not seek a judicial determination of fair value by condemnation proceedings in accordance with the provisions of the SEPTA Act nor to apply the standards of that Act in its negotiations. Instead, on February 17, 1965, a delegation from SEPTA asked the City to assign to SEPTA the City's purported option to purchase PTC for a formula purchase price. This purported option was contained in an agreement of July 1, 1907.

IV. The Assignment is Invalid Because PTC Was Not Granted an Opportunity to Bid.

The 1939 Agreement gave PTC the right to bid for the purchase option if the City chose to assign it rather than exercise it to purchase the Company. The pertinent language of paragraph *Eleventh* of the agreement is as follows:

> "The Company reserves its franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right."

Nothing in the agreement indicates that the Company could become a bidder only in the event that the option was "put up at public auction to the highest bidder." The obvious

purport of the agreement was that PTC should be able to purchase the option if the City assigned it at either a public or private sale. Since the contract states that the Company may become a bidder for the purchase option, the agreement must mean that the City bound itself to extend to PTC a right to become a bidder on assignment of the option.

Reference to the hearings before the City Council, relied on so heavily by the Trial Judge, leaves no question that PTC was to have a right to bid for the option if the City chose to assign the option rather than exercise it. Indeed, the statements made at those hearings show that no one thought the option would be assigned by means other than a public sale.[4] The following was Mr. Ballard's explanation of the meaning of the language "and may become a bidder for such right."

> "The wording 'and may become a bidder for such right' means this: You are going to have the right, and a real right under this option, to purchase this whole transportation system for let us say $85,000,000. If you don't want to do that out of the City's funds, you may well not want to use City's funds, the 1907 contract gave you the right to put that right up at auction, and ask Mr. Jones, a big operator in some other city, and Mr. Smith, a big operator in another city, 'We have got an option on the P.R.T. System; only $85,000,000. What will you buy my option for?'
>
> Somebody might come along and say, 'I will give you $90,000,000 for the option.' They might come along and say, 'I will give you $100,000,000 for that option.' And we might come along. Somebody might

4. As pointed out at page 31, *supra*, the law in 1939, like the City Charter today, would have required public bidding for the option.

> come along and say, 'We will give you $90,000,000 for that option.' Suppose P.R.T. stockholders want to stay in this business. That is quite a supposition. They might say, 'We will give you ninety-one.' See? And it gives us the right to stay alive, if we can be the highest bidder, and assures you the possibility of the existing outfit as a bidder at your sale, if you ever come to have a sale at (sic) your option." (Transcript of the Third Public Meeting of the Committee on Transportation and Public Utilities of City Council on May 1, 1939)

The record shows that the City never gave PTC the right to bid for the option before assigning it to SEPTA (N.T. 297, 390). That violation of the contract makes the assignment to SEPTA invalid.

This does not mean that PTC, by its right to bid, can prevent an acquisition of its property by the City or, for that matter, by SEPTA. The City can always condemn, and so can SEPTA.[5] But it does point up what is really involved in this case—an attempt by SEPTA to compel PTC to transfer the property for less than fair value, depriving PTC of its contract right to protect itself by making a competitive bid as provided in its contract with the City.

VIII. SEPTA Must Assume PTC's Liabilities.

The Trial Judge used only one paragraph of his opinion (pp. 136-137) to reach the unusual conclusion that SEPTA, having paid a purchase price measured by the funded debt and the Company's net worth, would be entitled to take PTC's assets free and clear of all liabilities. No words in the 1939 agreement indicate anything but that liabilities, having reduced the amount which the purchaser

5. See page 102, *infra.*, for an analysis of SEPTA's suggestion that condemnation by it is unrealistic.

had to pay under the formula, i.e., having reduced "undistributed corporate surplus", would be assumed by the purchaser. The Trial Judge decreed that the same liabilities must be charged against the stockholders twice, once by reduction of surplus and once by direct payment by PTC out of SEPTA's purchase price, only because the 1907 agreement said that the City took the assets "subject to all indebtedness" and the 1939 agreement contained no specific provision as to which party assumed PTC's liabilities (Opinion, pp. 136-137). The Trial Judge did not mention that the deletion of "subject to all indebtedness" was required because the 1939 agreement, unlike the 1907 agreement, contemplated that the indebtedness owed to the bond holders was to be discharged from the purchase price. All other indebtedness would be provided for by gearing the payment to surplus.

The theory adopted by the Trial Judge was not advanced even by SEPTA. SEPTA understood that "undistributed corporate surplus" is a component of net worth which, by definition, can be determined only by subtracting the amount of the Company's liabilities and stated capital from the amount of its assets. Accordingly, SEPTA's requests for findings were based on the theory that SEPTA assumed all liabilities, such as the amounts accrued for vacations and the reserve for injuries and damages, which were considered in computing PTC's undistributed corporate surplus. The only issue for the Trial Judge was whether or not SEPTA also had to assume PTC's obligation to make payments in the future to existing pensioners from the future revenues of the transit system. SEPTA must assume that obligation for the reasons set forth at pages 109 to 124, *infra*.

If the Trial Judge had adopted SEPTA's theory, all security holders would at least be treated equally. The

bond holders would have received the amounts due under their bonds and the stockholders would have received the $10 stated value of each of their shares of stock and any surplus that might exist. Under this theory the stockholders would pay for the Company's liabilities only once as a deduction from the Company's net worth.

The Trial Judge did SEPTA one better. It found that PTC had to assume all liabilities so that PTC's stockholders must pay for the Company's liabilities a second time. As a result, they may receive something or nothing for their stock depending on how generous SEPTA wants to be in assuming liabilities or in agreeing that PTC may use some or all of its cash to discharge liabilities. See pages 5 to 7, *supra*.

The Trial Judge fell into error because he failed to realize that the use of "undistributed corporate surplus" as a component of the purchase price means that the parties could only have intended that the City assume PTC's liabilities on exercise of the option. This is so because "undistributed corporate surplus," a component of net worth, can only mean the value attributed to the assets less the amount of the company's liabilities and the company's stated capital. Since the purchase price is measured by net worth, PTC's stockholder's have, in effect, satisfied the liabilities in the computation of the purchase price. If PTC must also assume those liabilities, its stockholders will have to pay for them twice. Such a result would be a monstrous miscarriage of justice.[6]

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6. For a hypothetical balance sheet demonstrating in greater detail that the City must assume all liabilities see page 72, *supra*. The whole framework, the bedrock, of corporate accounting requires an allowance for liabilities before the concept of surplus is even reached. For some unapparent reason the Trial Judge did not seem to understand this (Opinion, pp. 136-37).

IX. "Undistributed Corporate Surplus" Should Not Be Reduced by the Amount Necessary to Fund the Cost of Future Pension Payments.

The trial court's opinion on the pension problem begins by assuming that the parties had stipulated to the resolution of one of the fundamental issues before the court. The opinion states at page 129:

> "At the pre-trial conference and the trial it was stipulated that this obligation, of about $17,000,000 as of December 31, 1965, to retired employees is a present vested obligation or liability (and the obligation was similarly referred to during testimony)."

No such stipulation ever took place. At the pre-trial conference defendants expressly refused to stipulate that the amount was a liability. On pages 58 to 59 of the transcript of that conference, the following exchange took place:

> "MR. COLEMAN: I would next like the company to stipulate that there is a liability to pensioners who are presently on pension and retired from the company.
>
> MR. PRICE: Well, there is an obligation to pay them their pensions.
>
> MR. COLEMAN: There is a legal liability——
>
> MR. PRICE: I am not going into a semantics duel. I will agree there is an obligation to pay the pensions to the former employees who have retired and presently receiving pensions."

To be sure, plaintiffs' expert witness referred to the actuary's estimate of the amount necessary to fund the amounts payable in the future to the existing pensioneers as a present, vested liability (N.T. 190, 193-94).

However, the Trial Judge recognized at trial that one of the fundamental issues for his decision was whether or not an actuary's estimate of amounts necessary to fund a pension plan was a liability. When defendants' Controller, Mr. Juram, inadvertently answered a leading question using the phrase "actuarial liability," he asked for an opportunity to explain that he was referring to an actuarial estimate, and not to a liability. The Trial Judge said:

> "Well, don't worry. Whether the pension is charged as part of undistributed corporate surplus or not isn't going to turn on the slip of a tongue. Mr. Coleman used the word 'actuarial liability,' and you responded. But, you may restate it if you want" (N.T. 523).

The fact of the matter is that the estimate of the amount necessary to fund PTC's obligation to existing pensioners is not a liability in any sense which may reduce the amount of PTC's "undistributed corporate surplus." It is instead an estimate of an amount necessary to fund a future operating expense, and like other future operating expenses, must be met by SEPTA from the future revenues of the Company.

In brief, the pension dispute presents the Court with the question whether, solely in order to reduce the price to be paid by SEPTA, an operating practice followed since 1910 and an accounting procedure followed since 1950 shall be declared wrong, and a liability charged against the assets of the PTC as if it were a presently existing debt instead of merely an actuarial computation of the amount necessary to fund the obligation to pay pensions in the future to existing pensioners. The effect of such a ruling would be to require payment by the stockholders of an obli-

gation which the PUC has provided should be paid by the car riders and which the stockholders could never recover out of future revenues, although SEPTA could collect the full amount from the fares which have been set by the PUC at a level sufficient to provide for such payment.

Such a ruling would present an unanticipated benefit to SEPTA and do the stockholders irreparable injury by refusing to give effect to an accounting practice of long standing, which has been accepted by the PUC, was never challenged by the City until 1964, after it had begun to think of buying the Company itself and thus had an interest in reducing the purchase price, and one on which the stockholders and the Company had been given every reason to believe that they could rely. If at any time between 1910 and 1964 the City or the PUC had suggested that pension obligations should be funded and set up on an accrual basis instead of paid currently out of revenues as an operating expense, an application could have been made to the PUC for approval of the change and, if necessary, an increase in the rates of fare to carry any increased cost. In that way the riders would continue to carry the pension costs as the PUC had recognized to be proper, the past service costs would in due course have become wholly funded and there would be no basis for the present effort to make the stockholders pay a charge which is not rightfully theirs. The City, in effect, is saying that it set a trap for the PTC and has now sprung it, no longer for its own benefit, since it is not the prospective purchaser, but for the benefit of SEPTA, with whom it made a private deal to the disadvantage of the taxpayers of Philadelphia.

If the law requires such an unjust result the stockholders will have to suffer it, but it is submitted that only the most compelling reasons should lead a court so unjustly to enrich SEPTA and so harshly to penalize the stockholders,

who are now helpless to protect themselves against such a loss.[7]

Essentially SEPTA is seeking to use a bookkeeping device to reduce the price it must pay for PTC by eliminating the Company's surplus. This in itself is fundamentally unfair because PTC is a regulated company and the amount of its revenues are controlled. It is not allowed to charge what it can get and thus build up a large retained earnings account, as can an unregulated company. For such a company it wouldn't make too much difference whether retained earnings were charged with the full amount at one time and recouped in the future or had been paid currently in the past. In the long run the result would be the same. For PTC, however, the difference would be fundamental. It couldn't collect enough from the riders to fund the pensions without the approval of such a charge by the PUC. If it had paid the funding cost out of retained earnings, which in any event could not have been built up in anticipation of such a charge, it could never get the amount back. The PUC would have held that the obligation, having been paid, could no longer be included as a current operating expense.[8] Thus the stockholders, having paid the pensions

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7. It is especially unjust in the face of the legislative mandate in the SEPTA Act itself which directs that SEPTA shall assume the pension obligations and shall continue the rights, benefits and status of members and beneficiaries of the PTC pension plans. 66 P. S. §§ 2008(f)(24)(iii), 20025(c).

8. The Uniform System of Accounts, which is applied by the PUC to the PTC's operations (N. T. 1331-1332), permits the inclusion of pensions paid to retired or incapacitated employees in the Company's operating expenses (N. T. 1324-1327). PTC has claimed as an operating expense the amount of pensions paid to its employees in each of its rate filings since at least 1950 (Defendants' Exhibit 24). The amount of pensions paid PTC's employees has been allowed as an operating expense by the PUC (N. T. 744-764; Defendants' Exhibit 24), but the PUC has refused to allow any amounts in excess of the amount which will be paid in the base year (N. T. 744-746, 1336).

that the PUC had approved as proper to be paid by the car riders, could never recover the amount they had paid.

The estimate of the amount which PTC must pay its pensioners in the future is merely the estimated amount necessary to fund a future operating expense. Public utility commissions have generally recognized that the charge for pensions, whether based on past or future services, are an operating expense, not an income deduction or a charge to surplus. The Uniform System of Accounts which PTC must follow by order of the Pennsylvania Public Utility Commission includes as an operating expense "pensions and gratuities paid to retired or incapacitated employees . . ."

In Re *Uniform Systems of Accounts,* 82 P.U.R (NS) 161, 165-66 (N.Y.P.S.C. 1950) the New York Public Service Commission stated (pp. 165-66):

> "We must, therefore, conclude not only as a matter of modern economic thinking, but as required by law and accepted practice, that pensions are wages and constitute a present benefit. Hence, we must expressly overrule the decision in the Lake Placid Case and hold that upon the establishment of a pension plan, whether based on past or future services, or both, *the entire charge becomes an operating expense, not an income deduction or a charge to surplus.*" (Emphasis Added.)

This is now the universally accepted rule. See, *e.g., Public Service Commission v. Southern Bell Teleph. & Teleg Co.,* 253 Ala. 1 (1949); *Southern Bell Teleph. & Teleg. Co. v. Public Service Commission,* 203 Ga. 832 (1948); *Public Utilities Commission v. New England Teleph. & Teleg. Co.,* 80 P.U.R. (NS) 397, 417 (Me. S.C., 1949); *Re Michigan Bell Teleph. Co.,* 85 P.U.R. (NS) 327, 335 (Mich. S.C. 1950); *Re Southwestern Bell Teleph. Co.,*

77 P.U.R. (NS) 33, 44 (Mo. S.C. 1949); *Columbus v. Public Utilities Commission,* 154 Ohio St. 107 (1950); *Re Northwestern Bell Teleph. Co.,* 85 P.U.R. (NS) 368 (S.D. 1950); *Farmers' Union Educational & Co-Op. Assoc. v. Northwestern Bell Teleph. Co.,* 340 U.S. 934 (1951); *Re New England Teleph. & Teleg. Co.,* 116 Vt. 480 (1951); *State ex rel. Pacific Teleph. & Teleg. Co. v. Department of Public Service,* 19 Wn. 2d 200 (1943); *Re Wisconsin Teleph. Co.,* 80 P.U.R. (NS) 482, 497 (Wisc. 1949). And the New York P.S.C. reaffirmed its position in *Re Utility Pension Costs,* 93 P.U.R. (NS) 159 (N.Y.P.S.C. 1962). Since pension payments are future operating expenses, the Trial Judge's decision that future pension payments should be met now by the stockholders from the purchase price rather than by SEPTA from future revenues of the transportation system is fundamentally erroneous.

If SEPTA could impose this operating expense upon the stockholders, it would be reducing the price it must pay and at the same time be obtaining for itself not only the efficient operating organization that the existing pension plan has made possible, but also the equivalent of the reduction in price in the form of a valuable deferred asset, the right to receive the cost of the pensions from future revenues. It seeks to charge the pension obligation against the stockholders, and in so doing also acquire the right, which the stockholders will have lost, to receive a like amount a second time from the fares collected. This is indeed having both the penny and the cake too.

The idea that the amount necessary to fund the cost of future payments to PTC's pensioners should be carried on the balance sheet as a liability did not occur to the City until after it began to consider buying the PTC and was searching for ways to reduce the price. Certainly, none of the parties to the 1939 Agreement (Plaintiffs' Exhibit 6)

or those who approved the opening balance sheet thought that it should be considered a liability which would reduce the amount of PTC's undistributed corporate surplus. The amounts involved were large enough in 1940 so that the amount necessary to fund the pension plan would have been placed on the balance sheet if anyone then thought of it as a liability of the Company. In 1940 PTC paid $389,542 to its then-existing pensioners and the amount necessary to fund its pension plan for these pensioners was approximately $2,900,000 (N.T. 404, 408).

* * *

X. SEPTA Must Tender Payment on January 1, 1967.

Paragraph *Eleventh* as amended by the 1939 Agreement (Plaintiff's Exhibit 6) provides that the City may acquire PTC's assets "upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, an amount equal to . . ." the purchase price set forth in the agreement. SEPTA's notice of its intent to exercise the option designated July 1, 1966 as the payment date with full knowledge that PTC did not consider that SEPTA had the right to exercise the option. It chose this date instead of a date, for example, July 1, 1967, that would have provided ample time. In the settlement agreement of March 22, 1966, later rejected by the stockholders, it was agreed with full awareness of all the facts referred to by the Trial Judge, that the date upon which the purchase price should be paid would be extended from July 1, 1966 to January 1, 1967 in the event the agreement was rejected (N.T. 946-47), subject to the proviso that

"Nothing in this paragraph (iii) shall diminish any right to a further extension of such date of purchase to which SEPTA may be entitled by law by reason of the pendency of litigation" (N.T. 947).

The Trial Judge found that SEPTA "is not obliged to make payment pursuant to its exercise of the right to purchase until a reasonable time, which shall not be less than six months, after this case has been finally disposed of without the possibility of further appeal." Conclusion of Law No. 15. The Trial Judge said that "it would be most inequitable to penalize SEPTA because of the delay that ensued while the settlement was reduced to writing, submitted to the shareholders, and voted upon by the shareholders." He also reasoned that the litigation may not be over on January 1, 1967 so that SEPTA would be effectively precluded from raising the money in time to make payment (Opinion pp. 140-142).

None of these "reasons" is sufficient to relieve SEPTA of the obligation to give notice and make settlement in accordance with the terms of the agreements. PTC's rights under the contract to receive six months' notice and to receive payment on the July 1st specified in the notice should not be subordinated to SEPTA's desire to accomplish the purchase, if at all, pursuant to the existing notice. If the Trial Judge is correct in his conclusion that the purported option may be exercised by SEPTA at any time, SEPTA will be free at any time to give a new notice of intent to exercise the option in accordance with the terms of the agreement. Effect would then be given to the rights of both parties. If PTC is correct in its contention that SEPTA may not exercise the purported option, then the existing notice from SEPTA could not be effective so that the extension granted by the Trial Judge would be of no aid to it.

Certainly PTC's rights are not to be less favored than SEPTA's because of litigation. PTC, like SEPTA, has merely exercised its right to have a judicial determination of SEPTA's right to exercise the option. SEPTA selected the original payment date knowing that PTC would challenge SEPTA's right to exercise the option. SEPTA obtained PTC's agreement to extend the date to July 1, 1967 specifically with a view to the delays of reducing the agreement to writing and putting it up to the stockholders. Certainly there is no inequity in holding SEPTA to the second date in view of the fact that the time consumed by the settlement agreement did not delay proceedings by more than the six month period by which the payment date was extended.

The Trial Judge, by granting SEPTA a right to purchase PTC at its leisure following the termination of all litigation, has penalized PTC merely because litigation instituted by SEPTA is necessary to determine the rights of both parties. Regardless of whether SEPTA is entitled to purchase PTC by exercise of the purported option, under the terms of the agreement PTC is entitled to keep its property until, following a six month notice, SEPTA tenders the purchase price on a July 1st. The Trial Judge has held, in effect, that PTC has forfeited those rights because it has asked the court to declare invalid SEPTA's attempt to exercise the option. No principle of law deprives PTC of its rights under the agreement merely because the litigation instituted by SEPTA may not be resolved on the date SEPTA has agreed to pay the purchase price. The Trial Judge's decision to the contrary should be vacated.

XI. The Decree Nisi Must Be Vacated Because SEPTA's Acquisition of PTC's Assets in Accordance Therewith Under the City's Option Would Be Unconstitutional.

The fundamental question in this case is whether SEPTA may take the property of the PTC away from the Company and its 15,000 stockholders at a low bargain price against their will in violation of their constitutional rights, or whether SEPTA shall be required to pay the fair value of the property acquired in accordance with basic principles of constitutional law, contract law, reasonable interpretation, fairness and equity.

The Trial Judge has completely overlooked the fact that any acquisition of PTC's assets under the City's option in accordance with his reading of the option and his Decree Nisi would violate the Constitutions of the United States and the Commonwealth of Pennsylvania.

With respect to the constitutional issue there are certain very significant facts in this case which the Trial Judge apparently overlooked:

1. The most significant fact is that this is *not* a controversy between private parties. SEPTA is an agency of the Commonwealth of Pennsylvania and is, therefore, subject to certain constitutional restrictions not imposed upon private persons and limited by certain constitutional rights which PTC and its stockholders have in this controversy with SEPTA.

2. PTC never gave this purchase option to SEPTA. It made its "promise" to the City of Philadelphia, not to SEPTA. Therefore, the only question here is whether SEPTA, which received no "promise" from PTC [10] and

10. Throughout his Opinion the Trial Judge indicates his strong feeling that PTC shall "be obliged to keep its promise", that "PTC seeks to avoid its promise", and that PTC may not "repudiate its

which gave PTC nothing in return for the option, may constitutionally exercise that option as permitted by the Decree Nisi. It is completely irrelevant whether or not, and under what conditions, the City could have exercised that option constitutionally.

3. Other additional facts in this case which bear on the issue of constitutionality include the indeterminate period of the option and its separability from the basic 1907 Agreement, as amended; the right of the City to assign the option to others not confined to a City department; the fact that, since prior to 1939, the bulk of PTC's operating rights have stemmed from the Pennsylvania Public Utility Commission (not the City) and from independent leases and agreements with the City rather than from the so-called 1907 Agrement, as amended in 1939; and the fact that PTC's right to bid for the option was not respected. All these are elements in our contention that the option provision is so arbitrary and unreasonable that its enforcement by SEPTA is an unconstitutional taking of PTC's property without just compensation and without due process of law.

As an agency of the Commonwealth of Pennsylvania, SEPTA's power to acquire the private property of PTC and its stockholders for public use is limited by the constitutional guarantee of due process and the constitutional requirement that private property may not be taken or applied to public use without just compensation.

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obligations". At page 52 of the Opinion he said: "No matter how PTC states its argument, the statement amounts to a repudiation of a promise made so solemnly, and repeated so often, and relied upon by so many and to such an extent, that the repudiation is almost breathtaking in its audacity." However, since PTC never made any "promise" to SEPTA, there is no such promise to keep, to avoid, or to repudiate.

The 14th Amendment of the Constitution of the United States provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

PTC and its stockholders are also guaranteed due process by the Constitution of the Commonwealth of Pennsylvania.[11]

In addition, PTC and its stockholders are protected by Article 1, Section 10 of the Constitution of Pennsylvania providing: "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Similarly, the Fifth Amendment of the Federal Constitution provides: "nor shall private property be taken for public use, without just compensation." Though the Fifth Amendment applies only to the federal government, the 14th Amendment gives federal protection to one whose property is sought

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11. The Constitution of Pennsylvania contains no due process clause in the language of the federal constitutional amendment. However, Article 1, § 1 of the State Constitution does provide that "all men . . . have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." In addition, Article 1, § 9 of the State Constitution, which deals with the rights of an accused in criminal prosecutions, provides: "nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." This last provision, or its predecessor in previous constitutions, has been cited in civil cases, apparently on the theory that one who is not accused is as much entitled to the protection of these rights as one who is. *Philadelphia Gas Works Co. v. City of Philadelphia,* 331 Pa. 321 (1938); *Appeal of Palairet,* 67 Pa. 479 (1871). The terms "law of the land" and "due process of law" have been described as legal equivalents. *U.S. v. Yount,* 267 Fed. 861 (1920); *Eiffert v. Pennsylvania Central Brewing Co.,* 141 Pa. Super. 543 (1940). In any event, regardless of theory, it is well-established that due process is required under the Constitution of Pennsylvania as well as under the Federal Constitution. *Philadelphia Gas Works v. City of Philadelphia,* supra; 7 *Pennsylvania Law Encyclopedia* § 221, p. 446 (1958).

to be taken by authority of a state without just compensation, such a deprivation being without due process of law.[12]

The most recent example of the application of these fundamental constitutional principles in the acquisition of a transit system for public use is the decision of the New York Court of Appeals in July, 1966 in the *Fifth Avenue Coach Lines* case.[13] In that condemnation proceeding, the Court of Appeals, directing an increase in the awards made by the lower courts, held that the concept of just compensation requires not only compensation measured by the fair value of the physical assets but that fair compensation must also be given for intangible assets such as the company's routes, operating schedules, and accounting and maintenance records. The Court held that these intangibles were all "going concern assets for which claimants must be duly compensated" because, the Court stressed, "claimants' property was a viable operative transit system and was taken as such, with a clearly expressed intent to operate it after the forced transfer of title", even though this utility was a losing enterprise.

The right of a private transit company to be fully compensated, no matter how desirable the political or public motivation in acquiring its property for public use, was clearly stated by the New York Court of Appeals in *Fifth Avenue Coach Lines* in this language:

> "The only issue presented on this appeal which calls for a modification is the reliance of the courts

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12. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897); *Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390; *De Salvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312. See also 1 *Nichols on Eminent Domain* (1964) 456.

13. *In the Matter of the Application of The City of New York*, relative to acquiring title to certain real property, etc., *Fifth Avenue Coach Lines, Inc.*, Appellant-Respondent, *The City of New York*, Respondent-Appellant, unpublished Opinion, — N.Y. — (July, 1966).

below on erroneous principles of law regarding the evaluation of the condemnees' intangible property. The theory relied upon is unrealistic, *resulting in the denial of the just compensation to which claimants are entitled under the Constitution.* The present award is sufficient only as compensation for the value of the tangible property taken.

". . . HOWEVER LAUDABLE THE POLITICAL MOTIVATION IS IN DEPRIVING CLAIMANTS OF THEIR TRANSPORTATION SYSTEM, THEY MUST BE FULLY COMPENSATED THEREFOR. In *New York Edison Co. v. Maltbie,* 244 App. Div. 436, 442 (3d Dept. 1935), the court stated:

> 'This announcement indicates a motive to be generous toward needy ratepayers with the money and property belonging to the utility companies. Some may regard this as desirable and the motive as praiseworthy but *"the point is not one of motives but of constitutional authority* for which the best of motives is not a substitute." (*Panama Refining Co. v. Ryan,* 293 U.S. 388, 420). . . .' "

[Unpublished slip opinion, pp. 1-2; emphasis supplied.]

The Supreme Court of Pennsylvania has spoken very plainly and vigorously in upholding the constitutional rights of property owners "which neither zeal nor worthwhile objections can impinge upon or abolish", *Archbishop O'Hara's Appeal,* 389 Pa. 35, 58 (1957). Moreover, the Supreme Court of Pennsylvania emphasized in *Miller v. Beaver Falls,* 368 Pa. 189, 179 (1951) and again more recently in *Andress v. Zoning Board of Adjustment,* 410 Pa. 77, 85 (1963), quoting from the New York Court of Appeals, that

> "What the legislature cannot do directly it cannot do indirectly, as the constitution guards as effectively against insidious approaches as an open and direct act."

That principle governs this case. Because SEPTA cannot acquire PTC's property at a bargain price by eminent domain under either the SEPTA Act or the Constitution, it cannot acquire PTC without meeting its statutory and constitutional obligation to pay fair value for PTC's assets by taking from the City an assignment of the option so as to acquire PTC's property at a bargain purchase price.

In *Andress v. Zoning Board of Adjustment,* 410 Pa. 77, 82-86 (1963), the Supreme Court of Pennsylvania, in an opinion by Mr. Chief Justice Bell, summarized "the Constitutional boundaries which should guide legislators, planning commissions and zoning boards" and also "the rights of property owners and the limitations of Government" in strong language applicable to SEPTA and this case. The Court stated in part at p. 86:

> " 'As Mr. Justice Holmes said in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 . . . : "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."
>
> " 'While such regulations may not physically take the property, they do so regulate its use as to deprive

the owner, of a substantial right therein without compensation. *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change": Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416.

" 'The fundamental rights of ownership of private property, freedom of speech, freedom of religion, and freedom of the press, are the Hallmarks of Western Civilization. These four basic Freedoms constitute the fundamental differences which distinguish—and create the great impassable gulf which divides—Western Civilization from Communism and free peoples from peoples who are ruled by a despotic dictator or by an absolute or totalitarian form of Government."

And in *Lord Appeal,* 368 Pa. 121, 124-125 (1951), the Supreme Court stated:

"The principle of the sanctity of private property underlies several articles of *Magna Carta."*

* * *

"Both our Federal and State Constitutions provide for and *guarantee to every citizen* certain unalienable rights and liberties; and *with respect to property limit the paramount right of the Sovereign State to take an owner's land for a public use only,* and even then, only *if it pays the owner just compensation:* Fifth and Fourteenth Amendments to the Constitution of the United States; Article I, § 10, Article XVI, § 8, Constitution of Pennsylvania."

Proscribing any indirect or "end run around the Constitution", Mr. Chief Justice Bell, concurring in *Jacobi v. Zoning Board of Adjustment,* 413 Pa. 286, at 292-3 (1964), stated in part:

> "No one has fought for property and other Constitutional rights as frequently and strongly as I have . . . [citing cases] . . .
>
> "The basic rights of a property owner are centuries old and are constitutionally ordained and guaranteed and he cannot be deprived thereof without just compensation. *In an end run around the Constitution,* zoning has become a very popular Governmentally prescribed curtailment, deprivation and ofttimes blind erosion or unwitting destruction of the Constitutionally guaranteed rights of property . . . ."

SEPTA's claim that it is exercising a contract right granted it by an assignment from the City does not relieve SEPTA from these constitutional requirements when it thereby seeks to force PTC to sell its assets. First of all, the purchase option, at least as construed by the Trial Judge, is so outrageously unreasonable and unconscionable that no governmental body, including the City, could enforce it. The due process clause incorporates fundamental principles of fairness which prohibit any governmental body from acting unreasonably and arbitrarily.[14]

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14. Thus, for example, a private individual might terminate a lease for any reason or no reason at all in accordance with a lease provision granting him that right. However, no government housing authority could take advantage of such a contract right to evict a tenant for arbitrary reasons. Cf. *Rudder v. United States,* 226 F.2d 51 (D.C. Cir. 1955). In this case, a federal authority evicted a lessee on the basis of the District of Columbia Code providing that a tenancy from month to month may be terminated with 30 days notice without any reason. The reason for eviction was that the tenant refused to sign a loyalty oath. The court held that the eviction was

If the purchase price payable under the option is, as the Trial Judge has held, based upon balance sheet book value, then the purchase price and compensation to PTC and its 15,000 stockholders is many millions of dollars less than the current fair value of the property which SEPTA would take under the option. The Trial Judge decided that the term "undistributed corporate surplus" in the option price formula means "undistributed corporate surplus as stated on the Company's balance sheet" (Opinion, p. 110) and that it means, as applied to PTC's present balance sheet, PTC's "Retained Earnings" (Opinion, p. 155), and excludes revaluation surplus.

By so holding and by sanctioning SEPTA's strategy of acquiring PTC's property via an assignment of the City's option to SEPTA, the Trial Judge has changed the price that SEPTA has to pay from current fair value to a "book value" that represents original historic cost and is totally unrelated to the present day fair value which SEPTA would have to pay on condemnation. This deprives PTC and its stockholders of their property without just compensation and without due process of law. This is unconstitutional.

At the trial (N.T. 2089 et seq. and 2080-2118) PTC offered to prove that the asset "Road and Equipment", which has a book value on PTC's balance sheet at December 31, 1965 (P-37) of only $67,558,935 after depreciation, had an actual value in 1962 of between $162,000,000 and $171,000,000, after depreciation (based upon a trended original cost study of PTC's road and equipment as of

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improper because the government had acted arbitrarily. It said at page 53:

> "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."

September 30, 1962 made by the engineering firm of Gannett Fleming Corddry & Carpenter, Inc.) and that the value of the property has not substantially changed since then. The Trial Judge erroneously rejected this offer of proof. Thus, PTC has been prepared to prove that *the actual fair value of PTC's property which SEPTA seeks to acquire is more than $94,000,000 higher than present book value.* The Trial Judge struck from the record (N.T. 818) the opinion of a PTC director that PTC has an "undistributed corporate surplus" (which he defined as the excess value of assets over liabilities) of $140,000,000 (N.T. 811-815).

Though the Trial Judge refused to admit any evidence of the actual fair value of PTC's property today (see also N.T. 925-929, 1832, 2045-2046, 2111-2113), it must be abundantly clear to this Court that PTC will be able to prove that the present fair value of the property which SEPTA seeks to acquire under the option is very substantially in excess of the original cost values reflected on the books. It is a matter for judicial notice that the inflationary spiral over the years requires that a greatly increased dollar value be placed upon original costs incurred many years ago and still stated on PTC's balance sheet in the precise dollar amounts of those original costs. SEPTA seeks to pay in 1966 or 1967 dollars the dollar values of many years ago. This SEPTA could not do in condemnation proceedings. But this is what the Trial Judge rules SEPTA can do today. This is confiscation of the property of PTC and its stockholders without just compensation. This is a violation of their constitutional rights under the Federal and State Constitutions.

If SEPTA insists upon acquiring PTC's transportation system, the SEPTA Act authorizes it to do so through eminent domain and condemnation proceedings. But then the SEPTA Act specifically directs SEPTA to pay us "fair market value". What SEPTA has attempted in-

stead, and what the Trial Judge says SEPTA may do, is to grab the PTC transportation system (without condemnation proceedings but by an assignment and exercise of an alleged purchase option never given to SEPTA in the first place) at an extraordinarily low bargain price which is many millions of dollars less than fair market value.

This SEPTA may not do. First, the SEPTA Act requires, as we have previously pointed out, that SEPTA shall pay fair market value for property acquired whether through condemnation or through purchase. Secondly, if the SEPTA Act did not so require, the SEPTA Act would be unconstitutional by permitting SEPTA to pay less than just compensation upon acquiring private property. Thirdly, regardless of whether or not SEPTA has statutory authority to do what it has attempted to do, it is unconstitutional for SEPTA, an agency of the Commonwealth of Pennsylvania, to take our property at a price so much less than what it is worth today. SEPTA has tried what can be described, in the words of Mr. Chief Justice Bell, as "an end run around the Constitution". *Jacobi v. Zoning Board of Adjustment,* 413 Pa. 286, 293 (1964). However, "the Constitution guards as effectively against insidious approaches as an open and direct act", and "what the legislature cannot do directly it cannot do indirectly". *Forster v. Scott,* 136 N.Y. 577; *Miller v. Beaver Falls,* 368 Pa. 189, 198; *Andress v. Zoning Board of Adjustment,* 410 Pa. 77, 85.

It is unconstitutional for SEPTA to take PTC's transportation system away from the Company and its 15,000 stockholders at a price which is based only upon historic costs and which has no relationship to the present fair value of that property. This is enough to invalidate this proposed option purchase. However, the Trial Judge's total reading of the alleged option and its price formula

makes that option so unreasonable, so completely unconscionable, as to make it clear beyond doubt that it would be unconstitutional for any governmental agency, whether the City or SEPTA, under any circumstances or conditions, to require the Company to agree to such a purchase option in the first instance or to require the PTC to sell on any exercise of the option and pursuant to the option terms as interpreted by the Trial Judge.

According to the Trial Judge's decree, SEPTA's exercise of the option does not require it to assume any of PTC's liabilities. Not only does the Trial Judge rule that SEPTA will acquire PTC's assets free of the $17,000,000 pension obligation to PTC's retired employees which PTC would thus have to pay from the very inadequate purchase price received from SEPTA, but that "except as SEPTA may agree otherwise, PTC is responsible for its outstanding liabilities" [Conclusion of Law No. 12; Opinion, p. 155]. Therefore, the Trial Judge's Decree Nisi means that SEPTA gets all the assets, PTC's stockholders get all the liabilities. According to the Trial Judge, the alleged option means that the City and now SEPTA can decide whether or not something or nothing will be given to PTC's stockholders for their Company's transit system.

Is it conceivable either the Supreme Court of Pennsylvania or the Supreme Court of the United States would permit such a shocking, unconstitutional confiscation of private property? The Trial Judge's decree must clearly fall upon constitutional grounds alone.

Certainly, the Legislature of Pennsylvania did not contemplate such an unconstitutional confiscation when it enacted the SEPTA Act in 1963. On its face, the statute meets the constitutional requirements of Article 1, § 10 of the Constitution of Pennsylvania which provides that private property shall not "be taken or applied to public

use, without authority of law and without just compensation being first made or secured". Section 4(d)(5) of the SEPTA Act provides that, in acquiring or purchasing any property, SEPTA shall consider "the same value factors" as provided in the statute "in determining compensation under the exercise of eminent domain", and that means "fair market value". If the Trial Judge was correct that the assignment of the City's option to SEPTA was proper and that SEPTA need only pay the "book" or historical cost of PTC's assets, and that SEPTA need not assume any of PTC's liabilities even though SEPTA would be acquiring a viable operative transit system, then the Trial Judge's interpretation of the statute renders it unconstitutional because Article 1, § 10 of the Pennsylvania Constitution requires that, when property is applied to public use, fair market value must be paid. What the Trial court has done is to engraft upon the SEPTA statute an unconstitutional scheme of compensation, thereby rendering the statute as a whole unconstitutional. A statute, fair on its face, may be rendered unconstitutional by its application. *Great Northern Railway Co. v. Washington,* 300 U.S. 154 (1936); 16 *Am. Jur.* 2d Constitutional Law, § 151. If the SEPTA statute is unconstitutional, SEPTA, being a creature of the statute, no longer exists and has no standing whatever to acquire PTC's property.

Finally, the Trial Judge's decree results in an unconstitutional impairment of the obligation of PTC's contract with the City in violation of the Constitutions of the United States [Art. 1, § 17] and of Pennsylvania [Art. 1, § 10]. PTC has no contract with SEPTA, but the agreement which gave the City an option to purchase gave PTC the unconditional right to bid for the option if the City decided to assign the option rather than exercise it. See pages 41 to 42, *supra.* This was a contract right which

PTC had to protect itself by making a competitive bid. The Trial Judge carefully insured that PTC would meet what he found PTC's obligation to be, but he overlooked the City's solemn promise to grant PTC an opportunity to bid for that option. PTC may not be barred from bidding by the device of a private assignment to SEPTA, thereby changing the price that SEPTA has to pay from fair value to a "book value" that represents original cost and is totally unrelated to the present day fair value which SEPTA would have to pay on condemnation. PTC's contract with the City never contemplated that PTC would receive less than the fair and actual value of its property. As a result of the Trial Judge's decision, the rules have been changed on PTC and its stockholders in such a way as to constitute a clear impairment of their contract.

XII. The Trial Judge Erred in Excluding Evidence of Fair Value.

The Trial Judge erred in excluding, at the trial, any and all evidence of the current fair value of PTC's assets, ruling that such evidence was not admissible for any purpose.

At one point in the trial, when PTC made clear its contention that the option term "undistributed corporate surplus" is based upon actual, current fair value and not upon book value, the Trial Judge ruled that he would not receive any evidence of actual or fair value (N. T. 925-929).

Later in the trial (N.T. 2089 et seq. and 2080-2118) PTC offered to prove (through the testimony of Harold Waddington, a valuation engineer associated with the engineering firm of Gannett Fleming Corddry & Carpenter, Inc., and through a trended original cost study of PTC's road and equipment as of September 30, 1962 made by that firm under Mr. Waddington's supervision) that the asset

"Road and Equipment", which has a book value on PTC's balance sheet at December 31, 1965 (P-37) of only $67,558,-935, after depreciation, had an actual value in 1962 of between $162,000,000 and $171,000,000, after depreciation, and that the value of this property has not substantially changed since then (N.T. 2089-2090). We emphasized (N.T. 2113-2117), to clarify the offer after a comment by the Trial Judge indicated some misunderstanding on his part (N.T. 2111-2112), that this evidence was to establish the "true" actual value of PTC's "Road and Equipment" in 1962 and that its actual value today is substantially the same.

This evidence, showing that the actual fair value of PTC's property is more than $94,000,000 higher than present book value, was offered for the stated purpose of demonstrating that any interpretation of the term "undistributed corporate surplus" which does not give effect to actual values would be so unreasonable that specific enforcement of the option would be refused under the Elementary "principles of law that specific enforcement of a contract may be refused if the consideration for it is grossly inadequate or its terms are otherwise unfair or its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or third persons, and under the principles of law . . . that a contract must be construed reasonably to effectuate the intent of the parties and to avoid an absurdity, injustice or an unlawful end." N.T. 2090-2091; 2115-2118).

The Trial Judge erroneously rejected this offer of proof (N.T. 2111-2113; 2118).

The Trial Judge struck from the record (N.T. 818) the opinion of a director of PTC that the Company has an "undistributed corporate surplus" (defined by the witness as the excess value of assets over liabilities) of $140,000,000 (N.T. 811-815).

The Trial Judge even excluded any evidence of whether or not the values placed on the assets on PTC's balance sheet reflected their fair or actual value (N.T. 1832, 2045-2046).

In rejecting and excluding all evidence of present fair or actual value of the Company's assets for any and all purposes, the Trial Judge erred.

If he had found that "undistributed corporate surplus" relates to actual or fair value and not merely book value, then the exclusion of this evidence was not prejudicial and the Trial Judge might have been justified in ruling that it would be appropriate to determine the amount of that "undistributed corporate surplus" in a subsequent valuation proceeding and not in the present proceeding. However, at the time the evidence was offered, the Trial Judge had before him several possible alternatives in the interpretation of the term "undistributed corporate surplus" and it was, therefore, error for him to exclude evidence of fair value. This evidence was clearly relevant and necessary to show the unreasonableness of the Trial Judge's interpretation of "undistributed corporate surplus" as meaning "retained earnings" appearing on the balance sheet, thus using this book value item and excluding all elements of fair value. Such evidence was also clearly relevant and necessary to show the unreasonableness of the Trial Judge's decision that, "except as SEPTA may agree otherwise, PTC is responsible for its outstanding liabilities". The interpretation placed on "undistributed corporate surplus" by the Trial Judge made it impossible for PTC to have any subsequent opportunity to prove fair value. The excluded evidence was relevant and necessary to show also that the option contract, as interpreted by the Trial Judge, is unenforceable and unconstitutional.

With respect to the relationship of the fair value of PTC's property and the issue of constitutionality, that has been discussed in the preceding section of this brief, pages 128 to 142.

Section 367 of the *Restatement of the Law of Contracts* states that—"Specific enforcement of a contract may be refused if (a) the consideration for it is grossly inadequate or its terms are otherwise unfair, or (b) its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third persons, or (c) it was induced by some sharp practice, misrepresentation, or mistake."

Aside from constitutionality and enforceability, basic principles of contract law require that the purchase price formula in the option be given a reasonable construction. Proof of current fair value would demonstrate that it is grossly unreasonable to interpret "undistributed corporate surplus" as being limited to book value or original cost.

As stated in 8 *Pennsylvania Law Encyclopedia* § 130 (1958), "A contract must be construed reasonably to effectuate the intent of the parties and to avoid an absurdity, injustice or an unlawful end." See *Wilkes-Barre Twp. Sch. Dist. v. Corgan,* 403 Pa. 383, 386-387 (1961), discussed at page 104 *supra.*

This principle has been applied directly to require that actual values (inventories and income taxes) be taken into account where a carefully defined formula ("book value") reached an unfair result, *Aron v. Gillman,* 309 N.Y. 157 (1955), discussed at p. 103, *supra;* to permit determination of depreciation on a different rate than that taken on the books, *Hagen v. Dundore,* 187 Md. 430; and to take into account the value of expiration and renewal records of an insurance agency where a cross-purchase agreement based the price on certain financial statements which, since they

were kept on a cash basis, attributed no value to the renewals, *Hollister v. Fiedler*, 22 N.J. Super. 439.

The *Fiedler* case held that it was error to exclude proof of value of the renewals and, in reversing, directed that this evidence be received.

The evidence of value which was offered and excluded was essential to "a fair and reasonable interpretation" of the contract. The Trial Judge construed the language without reference to the material facts bearing on the meaning of the language employed. His failure to consider evidence of value resulted in an untenable and unreasonable construction. Evidence of fair value was clearly relevant and necessary to a proper consideration and resolution of the issues before the Trial Judge. Its exclusion was error which was prejudicial to PTC on one of the most important issues in the case.

XIII. Conclusion.

Whether public operation of PTC is wise or foolish, whether it would be efficient or inefficient, economical or expensive, thrifty or extravagant, whether it is desirable or undesirable for SEPTA or any other body to supplant the PTC as the operator of transit facilities in Philadelphia, or whether the taxpayers of Philadelphia or those using public transportation would be better or worse off if SEPTA became the operator, are matters which are not before the Court and should play no part in the consideration of this case. The problem of regional transportation will not be settled in this case and it is not for the courts to promote or retard its development except by a dispassionate application of legal principles to existing facts.

There is but one fundamental question in this case: May SEPTA take the property of the PTC from its stockholders at a bargain price against their will or is it required to pay the fair value of the property acquired?

The Trial Judge found that SEPTA did not have to pay fair value for PTC's assets and that under the 1939 Agreement PTC's stockholders had to pay for its liabilities twice. As a result, SEPTA would receive assets having a book value of approximately $97,000,000 free of all liabilities for a purchase price of $51,800,000. PTC's stockholders would receive nothing unless SEPTA graciously agrees to permit PTC to use all of its cash to meet liabilities. In that event, they might receive as much as $2 per share when estimated earnings per share for the current year alone are $1.70 per share. This is so because PTC, after having paid the funded debt from the purchase price, would have to meet $36,800,000 in liabilities from the $27,600,000 balance of the purchase price. Thus the Trial Judge's decree comes down to a judicially compelled conveyance for an inadequate price in fraud of creditors. And if SEPTA should graciously permit PTC to use cash to pay liabilities, the stockholders would get about 30 cents a share, about half a million dollars in all, above this year's earnings for all of the company's assets clearly worth many, many millions of dollars.

Certainly this decree must be vacated. That is not the problem in this case. The problem is what kind of decree to substitute for it. In solving that problem many intricate questions must be resolved by the Court. That can be accomplished only by a careful dispassionate, perhaps time-consuming study. It cannot be accomplished under pressure in a race against time.

Whether SEPTA exercises its right to condemn the property or whether it seeks to acquire PTC by purchase, SEPTA's mandate from the legislature requires it to pay fair market value for the property. This suit is an attempt to avoid that statutory requirement so that SEPTA may acquire PTC at less than its fair value under an asserted

right of the City which it gave to SEPTA. SEPTA has no statutory authority to exercise the option, and the City was prohibited from assigning the option to SEPTA without first giving everyone, including PTC, an opportunity to bid for it. The City Charter so requires. Moreover, the agreement which gave the City an option to purchase was coupled with a provision that gave the PTC a right to bid for it. PTC may not be barred from bidding by the device of a private assignment to SEPTA, thereby changing the price that SEPTA has to pay from fair value to a "book value" that represents original cost and is totally unrelated to the present day fair value which SEPTA would have to pay on condemnation.

If SEPTA may exercise the option by paying PTC's stockholders even $10 per share, a figure higher than they will get under the decree, the option right is probably worth many millions of dollars, as the Trial Judge has already observed. But SEPTA is prohibited from picking up a bargain at the expense of PTC's stockholders by the SEPTA Act and is prohibited from picking up a bargain at the expense of Philadelphia's taxpayers by the City Charter. SEPTA gave the City nothing in return for the option right other than its agreement to operate the transit system and to make the same payments for two years to the City in rentals that the PTC had been paying. That gift to SEPTA on SEPTA's statement of the case alone, must be struck down as a violation of the City Charter, and the exercise of the purported option must be struck down as a violation of the SEPTA Act.

To require PTC to accept less than the fair value of its property would be to deprive the PTC and its stockholders of their property without due process of law in violation of the State and Federal Constitutions. This would also change the rules on them in such a way as to constitute a clear impairment of their contract.

Elemental rules of the common law and of contract interpretation equally show that SEPTA's exercise of the purported option can be of no effect. The option contained in paragraph *Eleventh* of the 1907 Agreement was void by reason of the common law rule against perpetuities, both when it was originally created in 1907 and when the agreement was amended in 1939. Even if the City ever did have such a right, it is plain that subsequent agreements limited the term of that right to an exercise of the option on or before June 30, 1965. The option may not now be exercised by anyone.

Whether SEPTA's exercise of the option is effective or not, the City never had a right to purchase PTC's assets by paying the stockholders less than the fair value of the property. "Undistributed corporate surplus" in 1939 meant the excess of the assets, fairly valued, over the liabilities plus the capital stock. It means the same thing today. Most certainly it may not be exercised so as to deprive PTC's stockholders of the fair value of the Company's assets and, in addition, to require PTC's stockholders to pay for PTC's liabilities twice. Nor may it be exercised in such a way as now, for the first time, to require PTC's stockholders rather than the riding public to pay one of SEPTA's future operating expenses, i.e., the amounts that will become due in the future to the transportation system's existing pensioners.

Respectfully submitted,

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APPENDIX S.

Portion of PTC's Supreme Court Brief on the Declaratory Judgment.

STATEMENT OF THE QUESTIONS INVOLVED.

1. Do not the words "corporate surplus" mean the excess of the current fair market value of the assets of the company over the sum of the company's liabilities and the stated value of its capital stock and not merely "retained earnings"? *Negatived.*

2. Does not an agreement to sell all the property of a company, which makes its "corporate surplus" an element of the purchase price, require the purchaser to assume its liabilities and pension costs? *Negatived.*

3. In a declaratory judgment action for the interpretation of a contract of sale may the court lawfully and constitutionally

(a) extend the time of its performance beyond that fixed by the parties, *Affirmed,* and

(b) deprive PTC of its contract right to bid for an option? *Affirmed.*

4. In such an action is not evidence of the current value of the property to be hold admissible? *Negatived.*

5. Does not the Philadelphia Home Rule Charter require public bidding for the sale by the City of an option held by it to purchase all the property, including real estate, of a transportation company? *Negatived.*

6. May an option to purchase be exercised after the termination of the agreement creating it. *Affirmed.*

7. Is not an option to purchase all the property of a transportation company, including its franchises and real estate, which may be exercisable on any future July first, void as a perpetuity? *Negatived.*

8. Does it not violate the Federal and State Constitutions for SEPTA to take through the City's option a private transportation system, and for a state statute and state court to permit this, without

(a) paying fair market value, *Negatived,* and

(b) assuming the Company's liabilities and the obligation to pay future pensions out of future revenues? *Negatived.*

* * *

3. The Court Below Had No Power to Modify the Agreement of the Parties Relating to the Date of Purchase.

The trial judge modified the contract between the parties relating to the date of purchase under the option by substituting for the purchase date a "reasonable" time "not less than six months" after a final judgment (244a, 245a, 286a). Modification of PTC's rights under the contract was a constitutional impairment of the obligation of contract, was improper in a suit for construction of the contract, was not within the scope of a declaratory judgment proceeding and was beyond the power of the court.

The original date specified in SEPTA's notice of exercise of the option was July 1, 1966, a little less than a year after the date of its notice (72a). Paragraph *Eleventh* of the 1907 Agreement, as amended in 1939 (26-7a) reserved to the City the right to purchase the assets of PTC:

". . . upon any first day of July hereafter, . . ."

The method of notification was prescribed to be

> ". . . by serving six months' notice on the Company of its intention so to do. . . ."

To this was added the obligation of payment:

> ". . . and upon payment to the Company upon the date named in said notice. . . ." of the prescribed purchase price.

The notice of exercise of the option was given on the same day as the assignment of the option by the City to SEPTA. SEPTA was at that time aware that there were serious issues relating to the option. Because of these SEPTA might well have considered July 1, 1967, instead of 1966, to be a more reasonable acquisition date. On the other hand, SEPTA had power to condemn PTC's properties and acquire immediate possession.

Thus SEPTA had a choice.[15] It selected the earlier date, and by its own act placed itself in a position where it had what might become an impossible time-table. However, the July 1, 1966 date placed great pressure on PTC in settlement negotiations, and this might well have been the reason for fixing so short a time.

There were negotiations; and an agreement, subject to stockholder approval, was reached. The necessity of obtaining certain tax rulings and presenting the agreement to stockholders required time, and SEPTA needed a postponement of the purchase date under the option. Accordingly, the time of payment was extended by PTC in a letter from its President to SEPTA dated December 14, 1965. The letter (Ex. P-29), which had been sought by SEPTA, extended the date of purchase to November 1, 1966. That letter constituted clear recognition that tender by the date specified was essential and had not been waived. It said:

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15. It should be noted that the price a year later would vary with the profits or losses of the enterprise.

> "First, it is agreed that in the event the agreement is not executed by PTC on or before January 1, 1966, the date of purchase set forth in SEPTA's notice of intention to purchase under the 1907 Agreement will be extended to November 1, 1966, but without thereby increasing the price that SEPTA would otherwise pay."

This provision was regarded by SEPTA as so important that it was incorporated by reference in its entirety in a second letter dated December 31, 1965 (Ex. P-30):

> "Except for postponement of the trial to January 13, 1966 nothing contained in this letter shall prejudice the rights of either party in any pending or subsequent litigation. Except to the extent the provisions of this letter are inconsistent therewith, the provisions of our letter of December 14, 1965 (including, without limitation, those of the paragraph which commences with the word "First") shall remain in effect."

The agreement between SEPTA and PTC, subject to PTC stockholder and SEPTA Board approval, was reached on March 22, 1966 (1088a). PTC's stockholders failed to approve the agreement at their meeting on April 26, 1966 (1016a, 1024a, 1048a). The result of this was that the date named in SEPTA's original notice was extended by six months, to January 1, 1967 (see p. 5, *supra*). In his prior decision, affirmed by this Court, the trial judge relied upon the requirement that payment be made by July 1, 1966 as a reason for granting declaratory relief to SEPTA (1965 R. 87a). The six month extension exceeds by a month the time that the commencement of the trial of SEPTA's suit was postponed to provide time to formulate a contract, obtain necessary tax rulings and seek stockholder approval,[16]

16. The trial was first continued on December 15, 1965 (3a). The meeting of stockholders at which approval was sought was held on April 26, 1966 (1016a, 1024a, 1048a). The trial began on May 16, 1966.

which has now been overlooked (229a), and at the trial the trial judge indicated that settlement had to be made on January 1, 1967 (2231-2a).

SEPTA's petition for declaratory judgment made no request for reformation of the contract in respect of the acquisition date. Nevertheless, in the March 22, 1966 agreement it sought to reserve whatever right to a further extension it might have "by law by reason of the pendency of the litigation" (1101a). It is clear that SEPTA has no such right "by reason of the pendency of the litigation" or for any other reason.

This litigation is a matter of complexity and substance. Except for the postponements which were offset by the extension to January 1, 1967, it has proceeded with unusual dispatch. Despite SEPTA's frenetic efforts to make it appear that there has been delay in this case that simply is not the fact.

The trial began on May 16, 1966 and was pressed to a conclusion in a period of thirteen trial days, ending on June 3, 1966 (102a). An offer of proof as to the value of PTC's properties, clearly relevant to the issue of the reasonable interpretation of the option clause, was rejected for the reason, among others, that it would delay the trial (2020-1a).

In spite of these specific extensions made after the original notice was given and after SEPTA had instituted its declaratory judgment action, and even though it was the trial judge's own view that tender was required by January 1, 1967, the trial judge has tried to modify the obligation of the parties by providing that the payment might be made at any "reasonable" time not less than six months after a final judgment (244-5a, 286a).

If the purported option may be exercised by SEPTA at any time, SEPTA will be free at any time to give a new

notice of intent to exercise the option. If SEPTA may not exercise the purported option, either because it was originally void or because it has expired, then the existing notice from SEPTA could not be effective, and the extension granted by the trial judge would be equally ineffective.

The trial judge has held, in effect, that PTC has forfeited its rights under both the 1939 and 1966 agreements because, in a suit brought by SEPTA, it has resisted SEPTA's claim and has asked the court to declare invalid SEPTA's attempt to exercise the option. No principle of law deprives PTC of its rights under the agreement merely because the litigation instituted by SEPTA might not be resolved on the date SEPTA agreed to pay the purchase price.

The trial court's action in modifying the contract is without justification. It constitutes an impairment of the obligation of a contract in contravention of Article 1 § 17 of the Constitution of Pennsylvania. It is contrary to the decisions of this Court holding that a judge does not have power to modify the terms of a contract that is before him for construction. And finally, even if the petition in this action had originally sought to reform or modify the contract, such relief cannot be afforded in a declaratory judgment proceeding.

Article 1 § 17 of the Constitution of Pennsylvania provides: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

This has been held to bind the courts as well as the legislature. *Philadelphia Tr. Co. v. Northumberland Co. Traction Co., et al.*, 258 Pa. 152, 165-6 (1917); *Columbia & Montour Electric Co. v. The North Branch Transit Co.*, 258 Pa. 447, 454 (1917); *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 514 (1928); *Meehan v. Connell Anthracite*

Mining Co., 318 Pa. 481, 487 (1935); *Farber v. Perkiomen Mutual Ins. Co.*, 370 Pa. 480, 486 (1952).[17]

Irrespective of the Constitution, however, this Court has consistently held that judges have no right to modify the terms of contracts before them for construction. *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 514 (1928); *Hoffman's Appeal*, 319 Pa. 1, 5 (1935). The parties are bound by what they themselves have agreed to.

Even if the petition in this case had originally sought a reformation or modification of the contract, such relief could not have been granted in a declaratory judgment proceeding. *Baskind v. National Surety Corp.*, 376 Pa. 13, 16 (1954); *McWilliams v. McCabe*, 406 Pa. 644, 657-8 (1962).[18]

The trial judge's extension of the time of performance of the contract cannot be sustained. Since the provisions of the contract cannot be fulfilled, the issue presented in the case has become moot and the decree should be set aside.

4. The Court Below Had No Power to Waive the Requirement That PTC Be Given a Right to Bid for the Option.

In order to achieve the result it desired the court below also found it necessary to ignore another agreement

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17. Two opinions by Chief Justice Kephart, *Sinking Fund Commissioners of Philadelphia v. Philadelphia, et al.*, 324 Pa. 129, 133 (1936) and *Peoples-Pgh. Trust Co. v. Blickle, et al.*, 330 Pa. 398, 401 (1938), despite contrary language, do not affect the principle stated. Those cases related to the power of the courts to control the enforcement of a judgment and to set aside a sheriff's sale for gross inadequacy of price. Thus the applicability of Article 1 § 17 of the Constitution to cases involving the impairment of the obligation of a contract was not before the court, and the authority of those decisions should be restricted to their own facts.

18. A like conclusion was reached by the Supreme Court of California under a similar statute. *Lyon v. Goss*, 19 Cal. 659, 673-4, 123 P.2d 11, 19 (1942).

between the parties, to the material advantage of SEPTA and to the great disadvantage of PTC.

While professing to make PTC "keep its promise" (99a, p. 24, *supra*) the court below has relieved SEPTA, as successor to the City, of a concomitant promise of its own by simply ignoring the right expressly given PTC to bid for the option to buy the company after reserving to the City the right to condemn. Paragraph *Eleventh* of the agreement provided that

> "The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The company reserves it franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right."

The deal made by SEPTA and the City deprived PTC of its contractual right to bid for the option (532a, 606a). Such right was not dependent upon there being a public sale but was unconditional. The court below had no more power to relieve the City, and consequently SEPTA, of the obligation to allow PTC itself to bid whenever the City undertook to assign the option than it had to reform the contract fixing the time of performance.

7. The Judgment of the Court Below Must Be Reversed Because SEPTA's Acquisition of PTC's Assets in Accordance Therewith Under the City's Option Would Be Unconstitutional.

In the final analysis, the fundamental question in this case is whether SEPTA may take the property of PTC at a confiscatory price in violation of the constitutional rights of PTC and its 15,000 stockholders or whether SEPTA shall be required to pay the fair value of the property acquired.

By depriving PTC and its stockholders of their property without due process of law, by taking and applying their private property to public use without just compensation, the final judgment and decree of the court below are unconstitutional, and any acquisition of PTC's transportation system by SEPTA under the City's option so construed and so enforced would be unconstitutional, violating the rights of PTC and its stockholders under the 14th Amendment of the Constitution of the United States, under the due process requirements of the Constitution of Pennsylvania and under Article I, Section 10 thereof. As construed and applied here by the trial court, the purchase option and the Metropolitan Transportation Authorities Act of 1963 (the Pennsylvania statute under which SEPTA was created and pursuant to which it operates) are unconstitutional for the same reasons.[40]

By depriving PTC of its contractual right to bid, by giving PTC and its stockholders less than the fair and actual value of their property which PTC's option contract with the City intended and by modifying an agreement between PTC and SEPTA as to the date upon which payment of the purchase price is to be made, the City, SEPTA and the trial court have violated the constitutional rights of PTC and its stockholders under the obligation of contract guarantees of Article I, Section 10 of the Constitution of the United States and Article I, Section 17 of the Pennsylvania Constitution.

The court's decree, by requiring PTC to be obligated to pay future pension payments, retroactively deprives PTC of a fair rate of return and hence is unconstitutional under

40. Integral parts of the unconstitutional scheme in this case and, therefore, unconstitutional on the same grounds are the assignment of the purchase option by the City of Philadelphia to SEPTA, the ordinance of the City authorizing said assignment, the agreement of assignment, and SEPTA's exercise of the option.

the Fourteenth Amendment of the Constitution of the United States and the due process requirements of the Pennsylvania Constitution.

This is not a controversy between private parties. SEPTA is an agency or instrumentality of the Commonwealth of Pennsylvania (Septa Act § 4; 66 P. S. § 2004) and, therefore, SEPTA is subject to certain constitutional restrictions not imposed upon private persons and is limited by certain constitutional rights which PTC and its stockholders have in this controversy with SEPTA.

Whether or not, and under what conditions, the City could have exercised the option constitutionally is irrelevant. PTC never gave this purchase option to SEPTA. It was given to the City of Philadelphia. The only question here is whether SEPTA, which received no option from PTC or its predecessor company and which gave PTC nothing in return for the option, may constitutionally exercise that option as permitted by the trial court.[41]

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41. Additional facts in this case which bear on the issue of constitutionality include the indeterminate period of the option and its separability from the basic 1907 Agreement, as amended; the right of the City to assign the option to others not confined to a City department; the fact that, since prior to 1939, the bulk of PTC's operating rights have stemmed from the Pennsylvania Public Utility Commission (not the City) and from independent leases and agreements with the City rather than from the so-called 1907 Agreement, as amended in 1939; and the fact that PTC's right to bid for the option was not respected. All these facts are elements in PTC's contention that the option provision is so arbitrary and unreasonable that its enforcement by SEPTA is an unconstitutional taking of PTC's property without just compensation and without due process of law.

If the purchase option and price formula thereunder are to be construed and applied as the trial court decreed, this would be so unreasonable and so completely unconscionable as to make it clearly unconstitutional for any governmental agency, whether SEPTA or the City, under any circumstances or conditions, to require PTC to agree to such a purchase option in the first instance or to require PTC to sell on any exercise thereof. Cf. *Allegheny v. Millville, Etna & Sharpsburg Street Ry. Co.*, 159 Pa. 411, 415-416 (1893). It is unnecessary to

The constitutional issues were pointedly raised and fully argued below but were not considered by the trial court in its opinion. Rejection of PTC's constitutional argument was error.

A.

As an agency of the Commonwealth of Pennsylvania, SEPTA's power to acquire the private property of PTC and its stockholders for public use is limited by the constitutional guarantee of due process and the constitutional requirement that private property may not be taken or applied to public use without just compensation.[42]

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decide here whether the purchase option contained unconstitutional conditions or provisions which would make the option, so construed and applied, unenforceable even by the City which gave its consent initially to the construction of street passenger railways. SEPTA gave no such consent or franchise to PTC or its predecessor.

42. The 14th Amendment of the Constitution of the United States provides:

> "No State shall . . . . deprive any person of life, liberty, or property, without due process of law . . . . ."

PTC and its stockholders are also guaranteed due process by the Constitution of the Commonwealth of Pennsylvania. Though the Pennsylvania Constitution contains no due process clause in the language of the federal constitutional amendment, it is well-established that due process is required under the Constitution of Pennsylvania as well as under the Federal Constitution. *Philadelphia Gas Works v. City of Philadelphia*, 331 Pa. 321, 357 (1938); 7 *Pennsylvania Law Encyclopedia* § 221, p. 446 (1958).

Article I, Section 10 of the Constitution of Pennsylvania provides:

> ". . . nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured".

The 14th Amendment gives federal protection to one whose property is sought to be taken by authority of a state without just compensation, such a deprivation being without due process of law. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897); *De Salvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312, 316 (E.D. Ark. 1965). See also 1 *Nichols on Eminent Domain* (1964) 456.

The confiscatory nature of the trial court's decree is apparent. The trial court relied upon balance sheet figures. These figures are based upon historic costs recorded under prescribed PUC accounting procedures. They have no relationship to present fair value of the property. These historic costs go back decades. The inflationary spiral over the years requires that a greatly increased dollar value be placed upon the original costs stated in PTC's balance sheet to reflect current-day values. SEPTA seeks to pay in 1967 dollars the dollar values of many years ago.

At the trial (2197a et seq. and 2188a-2226a) PTC offered to prove that the asset "Road and Equipment", which has a book value on PTC's balance sheet at December 31, 1965 (Ex. D-44) of only $67,558,935 after depreciation, had an actual value in 1962 of between $162,000,000 and $171,000,000, after depreciation, and that the value of the property has not substantially changed since then. The trial judge rejected this offer of proof. Thus, PTC was prepared to prove that the actual fair value of PTC's physical property which SEPTA seeks to acquire is more than $94,000,000 higher than present book value.

Though the trial judge refused to admit any evidence of the actual fair value of PTC's property today (see also 1079a-1083a, 1943a, 2152a-2153a, 2219a-2221a), it must be abundantly clear to this Court that PTC will be able to prove that the present fair value of the property which SEPTA seeks to acquire under the option is very substantially in excess of the original cost values reflected on the books.

As we have shown in the discussion of the option formula, the concept of "corporate surplus" embodied in the formula was adequate to assure the flexibility needed to give PTC fair value whenever the option would be exer-

cised. Not only did the trial court reject this concept, but it went far beyond restricting the formula to book values.

According to the trial court, the option not only excludes all consideration of the fair value of PTC's assets, but it also excludes nearly five million dollars of capital surplus resulting from a transfer to that account of capital. (See pp. 11, 16, *supra*.)

Indeed, the option, as construed by the trial court, makes legally enforceable at SEPTA's option a conveyance in fraud of creditors of the assets of a company having retained earnings in excess of seven million dollars. From the purchase price of approximately $51,656,860,[43] PTC must discharge its funded debt of approximately $27,628,-332, leaving a balance of $24,028,528. From this amount the court below has required PTC to meet liabilities of $17,504,-372 and future pension payments to existing pensioners actuarially estimated at $16,911,696, or a total of $34,416,-068.[44] Thus, PTC could be saved from insolvency on exercise of the option only if SEPTA were gracious enough to permit PTC to meet other than current obligations with its cash and marketable securities totalling $14,934,747. The preliminary injunction entered in the proceeding for supplemental relief, however, precludes PTC from disposing of its assets in any manner other than the ordinary course of business (SR. 403a, 406a).[45]

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43. Of this amount, $17,018,660 represents $10 for each share of the outstanding common stock, less treasury stock, $7,009,868 represents PTC's retained earnings at year-end 1965 (Ex. D-44), and the balance of $27,628,332 represents PTC's estimate of its funded debt, call price, accrued interest, etc., as of December 31, 1966 (Ex. P-36).

44. Based on PTC's 1965 year-end financial statement. This excludes amounts due the City in excess of $11,000,000 for the purchase of equipment. SEPTA agreed to assume those obligations as part of the assignment agreement.

45. "SR. —a" refers to the record in the appeal in the proceeding for supplemental relief, January Term, 1967, No. 229.

The effect of these eliminations and charges was to reduce the stockholders' total equity to $4,547,207 or less than $3 per share, compared with total equity shown by the December 31, 1965 balance sheet of $28,818,184 (excluding treasury stock), or about $17 per share.

This result is not the product of the operation of an unprofitable business. The company's after-tax earnings in 1965 amounted to $2,949,533; its retained earnings as stated on its balance sheet at year-end 1965 were in excess of seven million dollars (Ex. D-44) and they have increased by three million dollars since then (SR. 77a).

At December 31, 1965, PTC had cash and marketable securities of $14,934,747, an increase of $5,665,712 during the year in addition to a reduction in its long-term debt of $5,549,000.

Nevertheless, PTC stockholders will realize next to nothing from the forced sale of this profitable business because of the trial court's refusal to require SEPTA to pay fair value for PTC's property and its conclusion that SEPTA has no obligation to assume either PTC's liabilities or its pension obligations, despite the fact that this results in a retroactive denial of PTC's federal constitutional right to earn a fair return on its investment.

The trial court's conclusion that SEPTA will assume none of PTC's liabilities is particularly shocking. If PTC were to borrow $300,000 for new equipment before the option date, SEPTA would, according to the trial court's decree, get the equipment and PTC would have to pay the $300,000 note.

The Pennsylvania Legislature, in adopting the Act under which SEPTA was created, recognized the constitutional limitations imposed on a Governmental agency and provided specific criteria applicable in the event of condemnation to assure the payment of fair value [Section 8;

66 P.S. § 2008]. But it went further. Section 4(d)(5) of the Septa Act provides that, in acquiring or purchasing any property, SEPTA shall consider "the same value factors" as provided in the statute "in determining compensation under the exercise of eminent domain", and that means "fair market value".

The Legislature thus applied the constitutional protection to all acquisitions. Accordingly, any attempt to avoid the standards of the Act by indirect means becomes a taking and application to public use beyond the power of the authority (SEPTA) and falls directly within the constitutional requirement of just compensation and due process of law. Since the trial court stated in its earlier opinion (1965 R. 96a) that the Septa Act was specifically directed to PTC, it follows that the Legislature specifically imposed upon the authority the obligation of dealing with PTC and its stockholders in a fair and constitutional manner. Therefore, SEPTA, in procuring the assignment of the option agreement and using it to force PTC to sell its property at a price much less than its fair value, is in direct contravention of the Act and the Constitution. This conduct constitutes the kind of "end run around the Constitution" which was condemned by Mr. Chief Justice Bell concurring in *Jacobi v. Zoning Board of Adjustment,* 413 Pa. 286, at 292-3 (1964), where he also stated: "The basic rights of a property owner are centuries old and are constitutionally ordained and guaranteed and he cannot be deprived thereof without just compensation."

Since the Legislature in enacting the Septa Act in 1963 was careful to provide safeguards against arbitrary action, the statute, on its face, meets the constitutional requirements of Article 1, § 10 of the Constitution of Pennsylvania. However, if the trial court interprets the statute to permit SEPTA under the assignment of the City's option to pay

the "book" or historical cost of PTC's assets, less capital surplus, and without the assumption of any of PTC's liabilities, to acquire PTC's transit system "as a whole", then the trial court's interpretation of the statute renders it unconstitutional. Article 1, § 10 of the Pennsylvania Constitution requires that when private property is taken or applied to public use just compensation (fair market value) must be paid. What the trial court has done is to engraft upon the Septa statute an unconstitutional scheme of compensation. A statute, fair on its face, may be rendered unconstitutional by its application. *Great Northern Railway Co. v. Washington,* 300 U.S. 154, 161 (1936); 16 *Am. Jur. 2d,* Constitutional Law, § 151.

This Court has spoken very plainly and vigorously in upholding the constitutional rights of property "which neither zeal nor worthwhile objectives can impinge upon or abolish", *Archbishop O'Hara's Appeal,* 389 Pa. 35, 58 (1957). Moreover, this Court emphasized in *Miller v. Beaver Falls,* 368 Pa. 189, 197 (1951) and again more recently in *Andress v. Zoning Board of Adjustment,* 410 Pa. 77, 85 (1963), quoting from the New York Court of Appeals, that

> "What the legislature cannot do directly it cannot do indirectly, as the constitution guards as effectively against insidious approaches as an open and direct act."

That principle governs this case. Because SEPTA cannot acquire PTC's property at a bargain price by eminent domain under either the Septa Act or the Constitution, it cannot acquire PTC without meeting its statutory and constitutional obligation to pay fair value for PTC's assets by taking from the City an assignment of the option so as to acquire PTC's property at a bargain purchase price.

In *Andress v. Zoning Board of Adjustment,* 410 Pa. 77, 82-86 (1963), the Court, in an opinion by Mr. Chief Justice

Bell, summarized "the Constitutional boundaries which should guide legislators, planning commissions and zoning boards" and also "the rights of property owners and the limitations of Government" in strong language applicable to SEPTA and this case. The Court stated in part at p. 86:

> "As Mr. Justice Holmes said in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 . . . . : 'The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.'
>
> "While such regulations may not physically take the property, they do so regulate its use as to deprive the owner, of a substantial right therein without compensation. 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416.
>
> "The fundamental rights of ownership of private property, freedom of speech, freedom of religion, and freedom of the press, are the Hallmarks of Western Civilization. These four basic Freedoms constitute the fundamental differences which distinguish—and create the great impassable gulf which divides—Western Civilization from Communism and free peoples

> from peoples who are ruled by a despotic dictator or by an absolute or totalitarian form of Government."

See also *Lord Appeal*, 368 Pa. 121, 124-125 (1951).

As the New York Court of Appeals stated in an opinion involving the condemnation of transportation property, *Matter of City of New York (Fifth Avenue Coach Lines, Inc.)*. 18 N.Y. 2d 212 at 218 (1966):

> ". . . However laudable the political motivation is in depriving claimants of their transportation system, they must be fully compensated therefor."

The Court continued:

> ". . . *In Matter of New York Edison Co. v. Maltbie*, 244 App. Div. 436, 442 (3d Dept. 1935), the court stated: 'This announcement indicates a motive to be generous toward needy rate payers with the money and property belonging to the utility companies. Some may regard this as desirable and the motive as praiseworthy but "the point is not one of motives but of constitutional authority for which the best of motives is not a substitute." (*Panama Refining Co. v. Ryan*, 293 U.S. 388, 420) . . . .' "

B.

The trial court's decree results in an unconstitutional impairment of the obligation of PTC's contract with the City in violation of the Constitutions of the United States [Art. 1, § 17] and of Pennsylvania [Art. 1, § 10]. PTC has no contract with SEPTA, but the agreement which gave the City an option to purchase gave PTC the unconditional right to bid for the option if the City decided to assign the option rather than exercise it. This was a contract right necessary to PTC to protect itself in circumstances exactly similar to those in which it is now placed.

The trial judge utterly disregarded the City's promise to grant PTC an opportunity to bid for that option. In addition, the trial court modified PTC's agreement with SEPTA as to the time of payment (pp. 44-50, *supra*). This also constituted an impairment of PTC's contract (pp. 49, *supra*), as did the trial court's modification of the option formula to require payment of less than fair value. As a result of the trial judge's decision, the rules have been changed on PTC and its stockholders in such a way as to constitute a clear impairment of their contract.

C.

The trial court's holding that the cost of future pensions is a liability which must be met by PTC from the purchase price, rather than an operating expense to be met by SEPTA from the future operations of the transit property, retrocatively deprives PTC of its past earnings without due process of law. PTC's rates have been limited by the legislature to those rates which are "just and reasonable" and in conformity with regulations and orders of the Pennsylvania Public Utility Commission. Act of May 28, 1937, P.L. 1053, Art. III, § 301, as amended, 66 P.S. § 1141. By "just and reasonable" rates is meant those rates which will cover legitimate operating expenses and will, in addition, permit a fair return on the fair value of the property devoted to public use. *Pittsburgh v. Pennsylvania P.U.C.*, 168 Pa. Super. Ct. 95, 106 (1951). It is fundamental that no state may prescribe rates for the future which do not permit a public utility to earn a fair rate of return on its property. That would deprive the utility of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by requiring a public use of private prop-

erty without just compensation. *West v. Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 671 (1935); *Smyth v. Ames*, 169 U.S. 466, 522-26 (1898).

The Pennsylvania Public Utility Commission has fixed PTC's rates in the past so that they would cover as an operating expense only the estimate of the amount of the pensions which PTC would, in fact, pay over the period for which the rates were prescribed (Ex. D-24, 878-82a, 919-29a, 1465-79a). As a result, PTC's pension costs, like other operating expenses, have been met currently by the riding public, and not by the stockholders, so that PTC might earn a fair return. The rates set by the PUC were not designed to enable PTC to meet current pension payments, provide a fund for future payments of the past service cost and, at the same time, earn a fair return. Obviously, higher rates would have been required to meet all three of those objectives.

Having declared PTC's rates to be fair and reasonable on this basis, the PUC could not now require PTC to fund its pension plan at the expense of the stockholders rather than from future fares. Any such requirement would be as much as taking of PTC's property without compensation as would prospective rate making which failed to account for the utility's operating expenses. Such a taking may not be disguised as a determination that PTC's rates in the past were excessive by the amount necessary to fund the pension plan, because the PUC may not retroactively revoke its own determination of the reasonableness of rates which it previously prescribed. *Arizona Grocery Co. v. A.T.&S.F. Ry. Co.*, 284 U.S. 370, 389 (1932); *Cheltenham & A.S. Co. v. Pennsylvania P.U.C.*, 344 Pa. 366 (1942).

The due process clause of the Fourteenth Amendment not only prohibits a prospective deprivation of the opportunity to earn a fair return, but equally prohibits a retroactive taking of the earnings made from those rates by a

determination that a different rule should have been applied in the past. In *Forbes Pioneer Boat Line v. Board of Commissioners,* 258 U.S. 338 (1922), the Supreme Court held that an act purporting to validate retrocatively the collection of canal tolls exacted by state officials without authority of law violated the Fourteenth Amendment because it deprived plaintiff of its right to recover money which was due it before the act was passed. The plaintiff had used the canal in reliance on its rights and was not "to be deprived of them because the Legislature forgot." 258 U.S. at 340. Similarly, if the PUC forgot to require funding in the past, it can cure that error only by requiring funding in the future from future income based on appropriately higher rates.

The Federal Gift Tax when first enacted was declared invalid to the extent that it applied to gifts consummated before the act taxing gifts came before Congress. The Court found it "wholly unreasonable" to tax one who disposed of his property without the slightest premonition that he would be charged for doing so. *Blodgett v. Holden,* 275 U.S. 142, 147 (1927). So, too, a carrier "is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Arizona Grocery Co. v. A.T.&S.F. Ry. Co.,* 284 U.S. 370 at 389 (1932). It would be wholly unreasonable now to require a funding of future pension payments from past income when the carrier had no idea that it would later be deprived of its earnings if it met its pension expense on a current pay-as-you-go basis in accordance with the regulations of the PUC.

Neither SEPTA, the City, nor the Court below has any more power to require PTC to meet future pension payments from past earnings than has the PUC. All three are agents of the state. Since it was the state acting through the PUC which permitted PTC to earn a fair return on the basis that only current pension payments were

an allowable operating expense, the state cannot now, acting through SEPTA and the court, require PTC to pay for future pensions from past revenues.

However, the trial court has held that the pension expense is PTC's liability which it must pay from its past earnings rather than an operating expense which the Septa Act provides must be assumed by Septa and paid from future revenues (225a-226a). Thus the decree of the court below retrocatively deprives PTC of its constitutional right to keep the fair return which it had been allowed to earn on its property, and its enforcement by SEPTA will accordingly deprive PTC of its property without due process of law.

8. A New Trial Should Be Granted to Enable PTC to Present Evidence of Value Which the Trial Judge Improperly Excluded.

It was reversible error for the trial court to exclude all evidence of the actual or current fair value of PTC's assets, including real estate. Notwithstanding SEPTA's constitutional duty to pay the fair value of PTC's assets and the critical relevance of asset values in deciding this case, the trial judge ruled that such evidence was not admissible for any purpose. (966a-967a, 973a, 1079a-1083a, 1943a, 2152a-2153a, 2197a-2198a, 2219a-2226a; p. 12, *supra.*)

Among the offers rejected by the trial court was the offer by PTC (2197a et seq. and 2188a-2226a), to prove (through the testimony of a valuation engineer associated with the engineering firm of Gannett Fleming Corddry & Carpenter, Inc., and through a trended original cost study of PTC's road and equipment as of September 30, 1962 made by that firm under his supervision) that the actual fair value of PTC's "Road and Equipment", with a depre-

ciated book value at December 31, 1965 (Ex. D-44) of $67,558,935, was between $162,000,000 and $171,000,000, after depreciation. It was emphasized that this evidence was to establish the "true" actual value of PTC's "Road and Equipment" in 1962 and that its actual value today is substantially the same (2197-98a, 2221-25a).

The trial judge arbitrarily rejected this offer of proof (2219a-2221a; 2226a) even though PTC emphasized that this evidence was offered to demonstrate that any interpretation of the term "undistributed corporate surplus" which does not give effect to actual values would be so *unreasonable* that specific enforcement of the option would be refused under the elementary "principles of law that specific enforcement of a contract may be refused if the consideration for it is grossly inadequate or its terms are otherwise unfair or its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or third persons, and under the principles of law . . . that a contract must be construed reasonably to effectuate the intent of the parties and to avoid an absurdity, injustice or an unlawful end." (2198a-2199a; 2223a-2226a).

At the time the evidence was offered by PTC, the trial judge had before him several possible alternatives in the interpretation of the terms "undistributed corporate surplus", and his opinion discloses recourse to outside materials to construe the phrase. Evidence of value was clearly relevant and necessary to a reasonable construction of the contract as well as to show that the option contract, as interpreted by the trial court, is unenforceable and unconstitutional.

In *Restatement, Contracts*, Section 367 states: "Specific enforcement of a contract may be refused if (a) the consideration for it is grossly inadequate or its terms are

otherwise unfair, or (b) its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third persons, or (c) it was induced by some sharp practice, misrepresentation, or mistake."

Aside from constitutionality and enforceability, basic principles of contract law require that the purchase price formula in the option be given a reasonable construction. See pp. 20-1. Proof of current fair value would demonstrate here that it is grossly unreasonable to interpret "undistributed corporate surplus" as being limited to book value or original cost, much less "retained earnings", and to decide that "except as SEPTA may agree otherwise, PTC is responsible for its outstanding liabilities."

In the cases referred to at page 21 *supra*, consideration was given to actual values to construe the formula reasonably. Thus, in *Aron v. Gillman*, 309 N.Y. 157, 128 N.E.2d 284 (1955) actual inventories and income taxes were taken into account where the formula—book value—reached an unreasonable result, and in *Hagan v. Dundore*, 187 Md. 430, 50 A.2d 570 (1946), the court permitted a determination of depreciation at a different rate than that taken on the books. In *Hollister v. Fiedler*, 22 N.J. Super. 439, 92 A.2d 52 (1952), the court held that it was error to exclude proof of value of life insurance renewals and, in reversing, directed that this evidence be received so that the value of these renewals could be taken into account where the formula (cash basis financial statements) had not attributed any value to them.

The evidence of value which was offered and excluded was essential to a fair and reasonable interpretation of the contract. The trial judge construed the contract without reference to the material facts bearing on the meaning of the language employed. His failure to consider evidence

of value resulted in an untenable and unreasonable construction. Evidence of fair value was clearly relevant and necessary to a proper consideration and resolution of the issues before the trial judge. Its exclusion denied PTC and its stockholders both procedural and substantive due process. Its exclusion was error which was prejudicial to PTC on one of the most important issues in the case. A new trial should be granted to enable PTC to present this evidence.

9. Conclusion.

It is submitted that the judgment of the court below should be reversed because of the misinterpretation of the words "undistributed corporate surplus" to mean merely "retained earnings", because the court below based the purchase price on the book value of PTC's assets instead of their current fair market value and, although the purchase price was declared to be "surplus," required the company to pay all of its debts out of the proceeds of sale even though their amount would have been deducted from the value of the assets in order to determine what the surplus was. It is also submitted that the decision of the court below should be reversed because the attempted exercise of the option was ineffective, that the court below had no power to extend the time agreed upon by the parties for the exercise of the option, that the attempted assignment of the option to SEPTA violated the provisions of the City's Home Rule Charter and were in derogation of the rights given to PTC by the option agreement itself to bid for the option on any purported transfer by the City, that the option was void ad initio as in violation of the rule against perpetuities, that even if valid it expired on June 30, 1965, and that the enforcement of the option in accord-

ance with the terms prescribed by the court below would be unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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I.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

In 1907, the City of Philadelphia entered into a comprehensive Agreement with the Philadelphia Rapid Transit Company (PRT), which agreement, as amended in 1939, provided, *inter alia,* that the City or its assignee could purchase on any July 1 all of the assets of PRT's successor, the Philadelphia Transportation Company (PTC) for a price specified in a formula contained in the Agreement. This right of purchase was duly assigned by the City to the Southeastern Pennsylvania Transportation Authority (SEPTA), which thereupon exercised said right. PTC publicly announced it would refuse to sell its assets under the Agreement, causing SEPTA and the City to seek an interpretation of the Agreement by a declaratory judgment action filed in the Common Pleas Court of Philadelphia. The trial court interpreted the Agreement as written and held that it called for PTC to transfer its assets to SEPTA, free and clear of all liabilities including an unrecorded vested pension liability, at a price equal to the sum of: (1) the funded debt; (2) the outstanding capital stock at $10.00 per share; and (3) the retained earnings, if any. The trial court also held that because PTC was frustrating the performance of the Agreement, SEPTA had until at least six months after the end of the litigation to make payment of the purchase price. The trial court's decision was affirmed by the Court of Common Pleas *en banc,* thereby making this decision final for *res judicata* purposes under Pennsylvania law until reversed. PTC appealed this deci-

sion to the Supreme Court of Pennsylvania, and thereafter, by an improperly constituted Board of Directors, attempted to declare a dividend, merge with another company, and authorized filing of another suit in the Federal District Court raising the identical issues which PTC, as appellant, had already placed before the Supreme Court of Pennsylvania. The trial court issued a preliminary injunction enjoining all three actions, pending deposition of the appeal but specifically stated that at any time PTC could seek a hearing on the preliminary injunction as to whether it should be made permanent. PTC elected to appeal the preliminary injunction to the Supreme Court of Pennsylvania, which after argument, affirmed the decisions of the trial court and the court *en banc* in both the original declaratory judgment action and the preliminary injunction proceeding. Thereafter, PTC did commence a suit in the Federal District Court and this suit is presently pending without threat of any contempt proceeding against PTC.

Therefore, the questions presented are:

1. Should this Court grant certiorari to review a state court decision which merely interprets words as written in a contract between a transit company and a municipality, providing a fixed price formula by which the City or its assignee can purchase all of the assets of the transit company?

2. Should this Court grant certiorari to review a preliminary injunction, now expired, which was issued by a lower state court to prevent defendant from starti g a federal suit until the state supreme court had acted on an appeal already taken by defendant raising the same issues sought to be presented to a federal court, where (a) the preliminary injunction

expressly provided that defendant was permitted to pursue its right of direct appeal including review by this Court, and that defendant at any time could obtain a hearing in the lower court on whether a final injunction should issue, (b) defendant has now commenced a suit in federal court following the decision on appeal by the state supreme court, and (c) even if the preliminary injunction had not been issued, any federal suit would then have been barred under principles of *res judicata,* by the final lower state court decree which was handed down four months prior to issuance of the preliminary injunction?

II.
COUNTER-STATEMENT OF THE CASE.

This is a contract case in which the state courts, interpreting the clear meaning of a contract under settled principles of state law, have refused to allow one party to the contract to avoid its contractual obligations thereunder. Thus, the fundamental issue is and has always been whether the Philadelphia Transportation Company (PTC) can avoid, solely by delay, its solemn promise to sell to the Southeastern Pennsylvania Transportation Authority (SEPTA), as assignee of the City of Philadelphia (the City), the portion of Philadelphia's transit system owned by PTC for an amount calculated according to a fixed contractual price formula to which PTC voluntarily agreed. The courts of Pennsylvania, following settled principles of state law, have uniformly held that PTC must honor its promise.[1] PTC now asks this Court to grant a writ of certiorari to declare that the contract is unconstitutional. That this is nothing more than an attempt to relitigate the basic state law questions is shown by the vague and rambling nature of the Petition, which fails to present a coherent position "with accuracy, brevity, and clearness" as required by Rule 23(4) of this Court.

The historical facts behind this litigation are helpful to an understanding of the groundless arguments which PTC now seeks to make.[2]

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1. Opinion and Decree Nisi of the trial judge (Spaeth, J.) filed July 14, 1966 (Pet. App. D), affirmed by Opinion and final Decree of the Court of Common Pleas *en banc* filed September 16, 1966 (Pet. App. E), affirmed by the Supreme Court of Pennsylvania, 426 Pa. 377, 233 A. 2d 15 (1967) (Pet. App. A).

2. These facts are recounted in some detail in the Opinion of the trial court (Pet. App., 54a-98a).

Since 1907, the Philadelphia mass transit system has been operated under a partnership arrangement between the City and PTC or (prior to 1939) its predecessor, the Philadelphia Rapid Transit Company (PRT). The core of the transit system is owned by the City. It was constructed by the City at an original cost of more than a quarter of a billion dollars (R. 1172),[3] an investment which far exceeds even the most extravagant values assigned to PTC's assets. The City has leased these facilities first to PRT and then to PTC under terms which for many years have provided a generous governmental subsidy, today amounting to more than $6,000,000 a year. The annual debt costs imposed upon the City with respect to these facilities alone are larger by that amount than the rentals charged therefor (R. 1172, 1176).

The partnership between the City and the operating transit company is embodied in a comprehensive agreement executed in 1907 and amended thereafter.[4] This agree-

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3. By 1951, the City had invested $180,480,980.86 in transit facilities (1951 Report of the City Controller, R. 570-72). The major items included in this figure are as follows:

Broad Street subway—including 200 cars	$108,497,749.62
Extensions of Market Street subway to 46th Street, and subway surface facilities to 36th & Ludlow, and 40th Street & Woodland Ave.	27,304,846.34
City Hall Concourse, Ridge Ave., 8th Street subway, Locust Street subway	26,454,224.88
Frankford Elevated Railway—construction and equipment including 100 cars	14,048,713.91
Bustleton surface line construction and equipment (no longer in operation)	573,136.45
Conversion of Bustleton surface line to trackless trolley operation	918,471.00

Since 1951, the City has invested an additional $72,000,000 in improved transit facilities, making a total investment in the transit system of $252,800,000 (R. 1172).

4. The 1907 Agreement and the 1939 amendments thereto were admitted into evidence at trial as Plaintiffs' Exhibits 1 and 6 (R. 2480-90, 2492-2504, 308-09, 323).

ment has always included as an essential element the right of the City or its assignee, upon notice, to acquire the assets of PTC or its predecessor at a fixed formula price. In 1939, when a bankrupt and worthless PRT was reorganized into the present PTC, the language of the reserved right of purchase set forth in paragraph Eleventh was amended into its present form:

> "Eleventh. The City reserves the right to purchase all the property, leaseholds and franchises of the Company and its wholly-owned subsidiaries upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company. The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its wholly owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: *Provided, however,* That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City

> the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised the City shall succeed to and become the owner of all the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly-owned subsidiaries and the City may either operate the same or lease the right to operate the same for such terms and upon such conditions as it may deem fit. The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right."

Two significant changes were made in the 1939 price formula from its former terms in the 1907 Agreement. They are:

first, the words "subject to all indebtedness now existing or hereafter lawfully created hereunder" which had previously followed the description of the assets to be acquired, were stricken out, thereby insuring that neither the City nor its assignee was obliged to assume any of PTC's debts and obligations; and

second, the purchase price was changed from an amount equal to the par value of PRT's outstanding stock to an amount equal to the funded debt of PTC, plus $10 per share of then outstanding common stock, which is the par or stated value of that stock, plus PTC's "then undistributed corporate surplus, if any" which the state courts have logically construed to mean undistributed earnings available for cash dividends.

PTC has always recognized that the contractual commitment which is embodied in the foregoing provisions is a promise enforceable against the company. The promise was fully set forth by PTC in every balance sheet issued by the company, and sent to all stockholders, for twenty years until 1965, after this litigation commenced[5] (Exhibit P-27, R. 2551-74, 362-63).

After 1939 it became increasingly apparent to the City and the public that Philadelphia's transit system was becoming progressively more inadequate, and that some new arrangements would have to be made. In more than fifty years, neither PRT nor PTC was able or willing to finance the cost of a single major expansion of the transit system. Thus the City determined that it would have to exercise its right of purchase for which it had bargained in the 1907 Agreement as amended, and because of which it provided subsidies to PTC and afforded it free services. But PTC opposed and sought to frustrate that effort every step of the way. In 1961, PTC prevented the City from obtaining a judicial declaration of the meaning of the price formula. *Philadelphia v. Philadelphia Transp. Co.*, 404 Pa. 282, 171

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5. A typical PTC report stated:

> The Agreement of July 1, 1907, as amended, between the City of Philadelphia and the Company provides, among other things, for the right of purchase by the City of the entire transportation system and property, leaseholds and franchises of the Company and its wholly-owned subsidiaries (except the corporate franchise of the Company). The City may exercise upon six months' notice its right to so purchase all the property, leaseholds and franchises on July 1 of any year by paying to the Company an amount equal to the sum of (1) the face amount or call price, if any, and accrued interest of all outstanding bonds, mortgages and ground rents of the Company and its wholly-owned subsidiaries, (2) the par value of all then outstanding preferred stock, (3) $10 a share for all then outstanding common stock, and (4) the undistributed corporate surplus, if any. (1963 Annual Report, Exhibit P-27S, R. 2572, 362-63.)

A. 2d 768 (1961). Thereafter, the City assigned the right of purchase to SEPTA.[6] The Supreme Court of Pennsylvania held that this assignment, specifically authorized by the contract, was made in accordance with Pennsylvania law (Pet. App., 7a-8a).

Following this assignment, SEPTA gave notice to PTC of SEPTA's exercise of the right of purchase, settlement to be held on July 1, 1966. PTC, however, publicly repudiated its obligation to sell under the agreement, knowing that such repudiation would, in the words of PTC's President, "make it virtually impossible [for SEPTA] to finance the acquisition of PTC by the option method" (R. 389).

SEPTA and the City were therefore obliged to commence litigation to obtain a binding declaration of the validity and meaning of the right of purchase. PTC's campaign of obstruction continued unabated. On July 27, 1965, PTC

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6. SEPTA was created in 1964 pursuant to the Metropolitan Transportation Authorities Act of 1963, P. L. 984, 66 P. S. § 2001 *et seq.* The recitals in that statute included the following:

> "[T]here exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated obsolete mass transportation facilities resulting in inadequate or overcrowded high cost conditions on our highways and existing mass transportation facilities;" 66 P. S. § 2002(a).

Recognizing that "the foregoing conditions cannot be effectively dealt with by private enterprise under existing law", and that "the public acquisition of existing mass transportation facilities . . . will promote the public health; safety, convenience and welfare," the Legislature concluded that "it is desirable that the public transportation systems in the metropolitan areas be combined, improved, extended and supplemented by the creation of authorities," and that "such authorities [should] cooperate with and/or acquire existing transportation facilities. . . ." 66 P. S. § 2002(c), (d), (f) and (h). The Legislature further determined that it would be in the public interest for municipalities, counties, etc., to transfer to such authorities "with or without consideration . . . any interest in real or personal property or . . . any . . . thing of value . . . which may be used by authority in the . . . acquisition [of transit facilities]." 66 P. S. § 2026.

unilaterally, and without justification, expelled the five City Directors who sat on PTC's Board pursuant to paragraph Fourth of the 1907 Agreement, as amended (R. 59-60 and Exhibits P-2a-2h in Appeal No. 229 in the Pennsylvania Supreme Court, R. 251-59, 55-58); PTC refused to permit SEPTA's engineers to examine PTC's property and records until forced to do so by a mandamus action, *Southeastern Pennsylvania Transportation Auth. v. Philadelphia Transp. Co.*, 38 D. & C. 2d 653 (Phila. 1965); PTC refused to permit the City Controller to make the examination of PTC's financial records called for under paragraph Fifth of the 1907 Agreement, as amended (Exhibits P-2i and 2j in Appeal No. 229, R. 260-61, 56-58); PTC refused to accept the jurisdiction of the court below in the declaratory judgment action brought by SEPTA and the City until ordered to do so by the Pennsylvania Supreme Court, *Southeastern Pennsylvania Transp. Auth. v. Philadelphia Transp. Co.*, 419 Pa. 471, 214 A. 2d 632 (1965); PTC then negotiated a settlement agreement with SEPTA through negotiators who specifically stated that they were authorized to speak for, and commit a majority of the PTC shareholders (R. 2368-69), but who, after five months of delay, failed to meet their commitment to obtain majority shareholder approval of the settlement (R. 1024-26); a substantial majority of PTC's directors promised to approve the settlement agreement and to use their best efforts to obtain shareholder approval thereof (R. 819-21; Exhibits P-29, P-30, R. 2592-96, 370-71, 373-74, 376), yet one of those very directors, and the shareholder interests he represented, turned around and waged a successful campaign to defeat the settlement agreement by a vote of PTC's shareholders who voted 851,768 to 788,654 against the settlement (R. 835, 1017, 1026-27, 1040-48); on the eve of trial, another PTC director and several shareholders sought to interfere with and postpone this litigation

by intervention to raise a claim of "fraud, accident or mistake" (R. 85-86), which, as the Pennsylvania Supreme Court held, the intervenors "were unsuccessful in proving" (Pet. App., 7a).[7]

Despite all of these harassments, this litigation proceeded to trial on May 16, 1966. Hearings were held through June 3, 1966, resulting (as stated in the Petition for Certiorari at p. 15) in a trial transcript of over 2,400 pages and over 80 exhibits with an additional 500 pages. At the trial, PTC first asserted that it would be wholly inappropriate to present in this proceeding any evidence of the value which PTC assigned to its assets, and that such evidence would be produced at some future date to determine the price payable by SEPTA (R. 1049-50, 1078-79); but PTC then reversed itself and attempted to introduce, through a witness not then available to testify, an out of date and inappropriate trended original cost estimate which PTC counsel had first said would not and should not be offered (R. 2188-2219).[8]

The trial judge wrote an exhaustive 157-page opinion (Pet. App. 45a-190a) analyzing all of the issues raised by PTC, and concluding that the contract right of purchase was valid and enforceable by SEPTA. With respect to the contract price which SEPTA is to pay for PTC's assets, the trial judge held that the contract provided that: (1) the price shall be an amount equal to the sum required to pay off PTC's funded debt outstanding on the contractual purchase date, plus an amount equal to $10 per share for the

7. These baseless allegations have been repeated in PTC's Petition for Certiorari in the form of vague and confusing charges of a wrongful "secrecy and unfairness" by the City and SEPTA in assigning the reserved right of purchase to SEPTA (Petition for Certiorari, p. 14, fn.).

8. It is this study which provides the only basis for the wildly inflated "fair value" claims asserted throughout PTC's Petition for Certiorari.

then outstanding common stock of PTC, plus the amount of the then "retained earnings" of PTC; and (2) SEPTA shall acquire PTC's assets free and clear of all liabilities, which liabilities PTC could pay off to the extent of available cash prior to the purchase date, unless the parties agreed otherwise. Finally, the trial court ruled that SEPTA shall have a reasonable time to make the foregoing payment, such time to be not less than six months after this litigation has been finally disposed of without the possibility of further appeal (R. 171, 188-89). PTC filed 147 exceptions to the trial court's adjudication which were dismissed by the Court of Common Pleas *en banc* on September 16, 1966, thereby making the *decree nisi* final and entitled to *res judicata* effect under Pennsylvania law.

Meanwhile PTC's campaign of dilatory tactics and harassment continued. Subsequent to the declaratory judgment action, PTC and an individual taxpayer whose counsel fees were paid by PTC (Exhibit P-13 at R. 324 in Appeal No. 229, R. 310-28, 162, 392) filed a taxpayers' suit challenging the validity of the City's assignment of the contract right of purchase to SEPTA even though this very issue was fully argued and decided in the declaratory judgment action (R. 188-97). *Immediately* following the court *en banc's* dismissal of PTC's exceptions in the declaratory judgment action and the taxpayers' suit, PTC announced its intention to file appeals in the Pennsylvania Supreme Court. Yet it then refused to do so for nearly three months despite repeated efforts by SEPTA to expedite the filing of such appeals. The appeals were ultimately filed on December 12, 1966, but on December 20, 1966, PTC's board of directors acting without notice to the City Directors, and despite the pending appeals to the Pennsylvania Supreme Court for which no supersedeas had been obtained) voted *first*, to authorize prompt filing of another suit in

federal district court challenging SEPTA's right to acquire PTC's assets (Exhibit P-13 at R. 312-22 in Appeal No. 229, R. 310-28, 162, 392), *second,* to pay a dividend of $1.00 per share on January 31, 1967 (R. 42 in Appeal No. 229), and *third,* to commence negotiations with another suburban Philadelphia transportation company, which negotiations, according to PTC's press announcement, looked toward the consolidation of the companies (R. 92, 216 in Appeal No. 229).[9] Finally, during the course of this litigation PTC continuously spent corporate funds for numerous advertisements in the public press attacking the acquisition of PTC's property by SEPTA as unwise (R. 88-91 and Exhibits P-9 and P-12 in Appeal No. 229, R. 297, 309, 88-91, 125-26).

Upon learning of certain actions taken at the PTC directors' meeting on December 20, 1966 which were prejudicial to the interests of SEPTA and the City, both parties promptly sought a preliminary injunction. The hearing on the preliminary injunction was held on December 28 and 29, 1966, at which time SEPTA and the City learned for the first time that PTC intended to commence new litigation in the United States District Court in an effort to circumvent the jurisdiction of the Pennsylvania Supreme Court (R. 171-73; 391-92 in Appeal No. 229). SEPTA and the City thereupon requested that such action by the company be preliminarily enjoined pending further hearing or a decision by the Pennsylvania Supreme Court on the appeal previously filed by PTC. This preliminary injunction was granted on January 6, 1967. PTC elected not to demand a

9. The Resolutions were adopted at a meeting of which the five City Directors were not notified, and from which they were improperly excluded (R. 384, fn., in Appeal No. 229). Thus, under Pennsylvania corporate law, the Resolutions are invalid, a nullity and of no force and effect, *Redstone Township School District,* 284 Pa. 325, 330-31, 131 Atl. 226, 228 (1925); *McCay v. Luzerne & Carbon County Motor Transit Co.,* 125 Pa. Super. 217, 189 Atl. 772 (1937).

hearing on a permanent injunction, but instead appealed from the grant of the preliminary injunction to the Pennsylvania Supreme Court. This appeal and the previously pending appeal were consolidated and argued on March 14, 1967. On July 27, 1967, the Pennsylvania Supreme Court affirmed the opinion and decree of the trial court both with respect to the right of purchase and the preliminary injunction. PTC subsequently filed a Petition for Reargument in the Pennsylvania Supreme Court, which petition was denied on September 26, 1967.

On December 15, 1967, PTC commenced an action against SEPTA and the City in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 44348, seeking a declaratory judgment under the Federal Declaratory Judgment Act that the right of purchase was unconstitutional and void for the same reasons as are asserted in the Petition for Certiorari. PTC did not file that Petition with this Court until December 22, 1967, which was 87 days after the denial of PTC's Petition for Reargument by the Supreme Court of Pennsylvania.

III.

REASONS FOR DENYING THE WRIT.

A. The Pennsylvania State Courts' Declaration That PTC's Promise to Sell Its Assets to SEPTA at a Fixed Price Constituted a Valid Contract Under State Law Is Not a "Taking" of PTC's Property Without Just Compensation.

There are no genuine constitutional issues in this case. The only question, which has already been conclusively answered by the state courts under settled principles of state law, is whether PTC must honor its voluntary contractual commitment to sell its assets at a fixed price to the City of Philadelphia or its assignee. To avoid the effect of this solemn promise, PTC has attempted to create a federal question by claiming that its property is being "taken" at a confiscatory price without just compensation. This far-fetched proposition is clearly foreclosed by all the precedents in this Court and certainly does not merit review on a writ of certiorari.

All of the decisions of this Court have held that the Fifth Amendment requirement of just compensation, applicable to the states through the due process clause of the Fourteenth Amendment, is operative only where property is "taken" by the government against the owner's will, and that enforcement of a voluntary contractual obligation previously entered into between a governmental body and a private company is not such a "taking". See, *e.g.*, *Kunhardt & Co. v. United States*, 266 U. S. 537; *New York, New Haven & H. R. R. v. United States*, 251 U. S. 123, *aff'g*, 53 Ct. Cl. 222 (1918); *Albrecht v. United States*, 329 U. S. 599.

As stated by the leading text-book authority on the law of eminent domain:

> "The constitutional provision which prohibits the taking of property for public use without compensation is directed only against the enforcement of an act of the legislature which attempts to authorize the seizure or destruction of property against the will of the owner. It has no application to the decision of a court upon the relative rights in property of parties litigant which have been voluntarily created by contract . . ." *2 Nichols, Eminent Domain,* § 6.1 at 364 (rev. 3d ed. 1963).

This Court has so held in every case presenting arguments similar to those raised here by PTC. In *Kunhardt & Co. v. United States, supra,* for example, a shipper contracted with the federal government to ship beans from Central America to New Orleans. In order to make the shipment, the shipper was obliged to employ a schooner which it had been negotiating to sell, and for which it had received an offer of $75,000. Subsequently, the government exercised its contractual right to cancel the shipping agreement. The shipper then sold the schooner for $40,000, and sued the government for $35,000 on the grounds that, having been "forced" to forego the earlier offer of $75,000, its property had been taken without just compensation. This Court rejected this proposition after argument by the Petitioner without even hearing answering argument by the Solicitor General of the United States. (See 69 L. Ed. at 429.) Said this Court:

> "It is clear that on the facts alleged the depreciation in the sale value of the schooner cannot be recovered on the theory which the claimant here urges, that this is compensation for a taking of the schooner

'under eminent domain' in the performance of 'obligatory orders or requisitions' for the sale and delivery of the castor beans. The United States did not requisition or take over the schooner, or appropriate its use. The first purchase contract gave the United States the option to require the castor beans to be delivered at any Gulf port in the United States; and the second specifically required them to be delivered at New Orleans. The United States, therefore, was entirely within its contract rights in insisting that the claimant should deliver the beans at New Orleans, as agreed; and if the claimant had no other means of so delivering them than by using its own schooner for that purpose, it was, in preparing so to do, merely conforming to its contract obligation." 266 U. S. at 540.

See also, *New York, N. H. & H. R. R. v. United States, supra,* rejecting the contention that plaintiff's property had been "taken" under the eminent domain power where the rights and duties of the parties were defined by contract. In that case, a railroad argued that it was an unconstitutional taking to require it to continue to deliver mail under contracts at stipulated prices which had allegedly become confiscatory. This "constitutional" argument was rejected by both the Court of Claims and this Court. Particularly relevant here is the following passage from the Court of Claims opinion:

"If the plaintiff had been compelled to carry the mails without a contract . . . and claimed greater compensation therefor than it received and that less was unreasonable and confiscatory, there would be a sound basis for this claim. However, all of the service which it rendered was under contracts voluntarily entered into with the Government. It may have lost money

> by such contracts; it may have lost so much as to bankrupt it and thus make it in effect completely confiscatory; but that would not be the first time that contractors have lost money by their engagements with the Government; and we have never before known any contractor to claim that property lost by him in the performance of a contract with the Government had been taken from him within the meaning of the Fifth Amendment, and hence that he was entitled to just compensation for the same. What constitutes a 'taking' within the meaning of the Fifth Amendment is a question this court is often called upon to determine, and we have never examined a case in any court where property voluntarily given up and paid for under contract has been claimed as taken under the Fifth Amendment." 53 Ct. Cl. at 237.

Again in *Albrecht v. United States,* 329 U. S. 599, 603-04, this Court held that condemnees were estopped to claim interest on the amount paid for their property where their contractual arrangement with the Government did not provide for interest, even though interest would have been required by the Fifth Amendment absent a contract. *Accord, United States v. 3.25 Acres of Land,* 53 F. Supp. 884, 885 (W. D. N. Y. 1943) ("The right to just compensation for property taken and the right to an award for an amount expressly agreed upon are inconsistent rights."); *United States v. Certain Parcels of Land,* 102 F. Supp. 691, 697 (W. D. Pa. 1952) ("The parties may bind themselves to a consideration which may be either greater or less than just compensation in the constitutional sense.").[10]

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10. See also, *Dolan v. United States,* 351 F. 2d 671 (5th Cir. 1965); *United States v. Dillon,* 346 F. 2d 633 (9th Cir. 1965), *cert. denied,* 382 U. S. 978.

The result reached in the foregoing decisions is dictated not only by the clear language of the Fifth Amendment (which refers only to property "taken" by the government) but simple common sense. To hold that a court's recognition of a voluntary contract between a governmental body and a private person at a price freely negotiated is nevertheless subject to the just compensation provisions of the Fifth Amendment would mean that government, state or federal, could never acquire property as a result of a voluntary negotiation. In every transaction, the private person could resist performance when it came time to perform under the contract on the mere assertion that if he had not previously entered into a voluntary contract he could at a later date have received a higher price in condemnation.

PTC seeks to obscure the central fact that this is purely a contract case, governed by state common law principles, by arguing that the City's continuation in 1939 of the right of purchase which it had held under the 1907 Agreement (Pet. App. 305a) "compelled" PTC to waive its constitutional right to just compensation. This contention is clearly without merit since the execution of the contract was approved by the Federal District Court in the reorganization proceeding in 1939. But beyond this, the argument ignores the huge benefits PTC has received from the City for more than twenty-five years in reliance upon the right of purchase. The City's contributions to PTC began from the moment of the company's birth. In 1939, the City gave its assistance to PRT, then in bankruptcy, and helped it to reorganize into PTC at a time when PTC's stock was virtually worthless.[11] It granted the basic fran-

11. Indeed, PTC's stock was selling at only $5 per share as late as 1962, shortly before SEPTA's creation. Not until SEPTA came into existence in 1963 with the obvious purpose of acquiring

chises pursuant to which PTC has operated trolleys and high-speed cars in and under the streets of Philadelphia; and, most significantly, in reliance on its reserved right of purchase dating from 1907,[12] the City spent more than $250,000,000 on improved transit facilities,[13] which today constitute the heart of the system operated by PTC. The annual cost of these facilities in debt service alone to the City is over $6,000,000 more than the rentals therefor charged to PTC (R. 1172, 1176). Without these valuable improvements which the City owns, and which neither PTC nor PRT could ever have constructed, the small portion of the system owned by PTC would be virtually inoperable and worthless. Yet PTC now says that, having accepted and profited from all of the benefits flowing from its contractual relationship with the City, it has a constitutionally protected right to reject what it now sees as the responsibilities of that contractual relationship.

Moreover, PTC's argument overlooks another aspect of the economic realities existing in 1939. PRT was then utterly bankrupt, and the City could clearly have taken over the entire transit system at that point. Had it done so, the company's stockholders would have lost forever any opportunity to recoup their investment through future earnings of PTC. Instead, the City afforded them such an opportunity, but retained, in amended form, the 1907 right of purchase, and conferred other valuable benefits already

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PTC's assets did speculation drive the price of the stock up. (Testimony of PTC President Albert C. Lyons before Philadelphia City Council on March 23, 1965. The Pennsylvania courts held at a prior stage in this litigation that such testimony is properly subject to judicial notice: Opinion of Spaeth, J., August 27, 1965, p. 3, *aff'd. per curiam* 419 Pa. 471, 233 A. 2d 15 (1965).)

12. The City has actually held a right of purchase with respect to transit facilities since 1857 (Pet. App. 54a-58a).

13. See footnote 3, p. 5, *supra*.

described. As such, the retention of the right of purchase was an entirely reasonable consideration in exchange for this aid to the stockholders under the economic conditions then existing. No principle of constitutional law requires such a severe crippling of the municipal contracting power, as would have limited the City in 1939 to the single forced alternative of an immediate take-over of a bankrupt utility, at great prejudice to the stockholders. Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1604 (1960).

Finally, it is perfectly clear that PTC's predecessor understood in 1939 that the bargain was a valuable one for the company. In public testimony before Philadelphia City Council which is set forth *in extenso* in the trial court's opinion (Pet. App. 150a-57a), counsel for PRT begged the City to accept the amended right of purchase. Two separate and distinct rights of the City were made crystal clear. Under the amended contract, the City could either acquire PTC's property by condemnation at an uncertain price or buy it at the contract price which was fixed on the basis of the unreturned remaining investment of the stockholders and bondholders of the company, plus undistributed earnings.[14] As the trial court observed, "had condemnation taken place immediately, the common stockholders would have received very little" because PTC's initial capitalization was $20,000,000 in excess of the value of the assets for which securities were issued (Pet. App. 157a). The pur-

14. The clear distinction made in the contract right of purchase between the City's right to condemn, and the right of the City or its assignee to acquire the property under the contract at a fixed formula price, destroys PTC's basic argument that this is really a condemnation proceeding (Petition for Certiorari, pp. 26-27). It also provides a conclusive answer to PTC's claim that it has a constitutional right to create additional surplus for which SEPTA must pay by writing up alleged unrealized appreciation of its assets. Such a write up would, as the state courts recognized, transform this litigation into a condemnation proceeding, and deprive the public of the contractual benefits for which it paid.

chase price formula, on the other hand, allowed a return to the stockholders greater than the value of their original stock. In view of the total bankruptcy of PTC's predecessor in 1939, it is evident that the bargain so carefully negotiated at that time was an entirely reasonable one for the company and its stockholders. Under these circumstances, retention of a right to purchase hardly *compelled* PTC to surrender anything; rather, it provided the basis for all of the extraordinary benefits conferred by the City upon PTC. These benefits destroy any argument that the contract price provides less than just compensation.

In sum, the simple truth in this case is that the City of Philadelphia has already paid PTC just compensation for its property many times over. It is the City, SEPTA and the citizens of southeastern Pennsylvania who will have been denied just compensation if PTC can now renege on its promise to sell.

B. The State Courts' Interpretation of the Contract Right of Purchase, Based Upon Settled Principles of State Law, Did Not Deprive PTC of Its Property Without Due Process of Law.

It is evident from the Petition that PTC has attempted to transform every facet of the state court's decision with which it disagrees into an issue of constitutional dimensions. Thus, PTC claims that it has been retroactively denied a fair rate of return on its investment simply because, under the contract, SEPTA is not obliged to assume PTC's liabilities, including a vested, but unfunded liability for pensions to retired employees, who will never work a day for SEPTA (Petition for Certiorari, pp. 22-27).[15]

15. PTC has for many years disclosed this vested, unfunded liability in a footnote to its annual balance sheet which is sent to all stockholders (Exhibit P, 28A-28P, R. 2575-91, 364-65). As of December 31, 1965, a footnote to PTC's own balance sheet reflected

This contention does not raise any legitimate constitutional questions meriting review by this Court. In the first place, it ignores the fact that SEPTA will assume a pension obligation of more than $35,000,000 in past service costs to present PTC employees (See fn. 15, pp. 22-23). But more fundamentally, it ignores the provisions of the City-PTC contract itself. The state courts interpreted this contract as providing that PTC would remain obligated for liabilities outstanding at settlement because that is exactly what the contract says. This is graphically demonstrated by comparing the language of the purchase clause before 1939 with the language then negotiated.

Prior to 1939, the reserved right of purchase permitted the City or its assignee to purchase "all the property, leaseholds and franchises of the Company *subject to all indebtedness now existing or hereafter lawfully created hereunder*" (Emphasis added) (Pet. App. 305a). In 1939, the emphasized words were stricken out of this provision, compelling the conclusion that the state courts correctly decided that SEPTA takes PTC's assets free and clear of all liabilities. This holding accords with settled state

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a total pension obligation of more than $42,000,000 to employees who had already retired and to present non-supervisory employees who had accrued past service costs for prior service (Exhibit P, 28-P; R. 2591, 365). This figure does not include any amount for past service costs attributable to present supervisory employees. None of the pension liability was ever taken into account by PTC to reduce the amount of undistributed surplus carried on PTC's books, thus requiring SEPTA to pay a higher purchase price.

PTC has stipulated that approximately $17,000,000 of this pension obligation is a vested liability (R. 964). This is the amount which PTC must assume under the terms of the right of purchase. The balance of this obligation—more than $35,000,000 if supervisory employees are included—will be assumed by SEPTA. Although it was perfectly free to do so, PTC never made any provision for funding any of this mounting pension obligation. It must therefore make provision for its retired employees (who will never work for SEPTA) out of the purchase price payable by SEPTA.

law, for it is hornbook law in Pennsylvania, as elsewhere, that where one party sells all of its assets to another, the purchaser is not, absent a specific provision to the contrary, liable for the debts and liabilities of the seller. *Advance Beneficial Order v. Penn Safe Deposit & Trust Co.*, 195 Pa. 602, 613-14, 46 Atl. 102 (1900); *Art Society v. Leader Publishing Co.*, 60 Pa. Super. 548 (1915); *Fletcher, Cyclopedia Corporations*, § 7122 (rev. ed. 1961); *Ballantine, Corporations*, p. 677 (rev. ed. 1946). As amended in 1939, the 1907 Agreement contains no such provision, and the history of the Agreement proves that this omission was deliberate.

Despite the fact that SEPTA will be saddled with by far the greatest portion of the unfunded pension obligation (an obligation of which PTC could never divest itself if it attempted to liquidate), PTC presses its contention that it has been retroactively deprived of a fair rate of return on its investment by arguing that it did not, in past years, claim as an operating expense for rate making purposes any amount to fund the pension liability. Indeed, PTC goes much further and implies that it was *required* to treat its pensions on a pay-as-you-go basis for rate making purposes (Petition for Certiorari, pp. 22-24). This is flatly wrong. PTC could have commenced funding its pension liability in 1939 or any other year. Funding payments would have been treated as an operating expense for rate purposes by the Pennsylvania Public Utility Commission. This is the holding of the very Pennsylvania case cited by PTC for the contrary proposition, *Pittsburgh v. Pa. P. U. C.*, 370 Pa. 305, 316-23, 88 A. 2d 59, 65-69 (1952).[16] Moreover, it was shown at the trial in the instant case that many other utilities in Pennsylvania subject to P. U. C. jurisdiction have funded pension plans (R. 1417-18, 1731-32). Thus

16. Petition for Certiorari, p. 23, fn.

it is evident that PTC is now complaining only of the inevitable consequences of its own bad judgment in failing to make any provision whatsoever for its vested pension liability, in the face of its voluntary contractual obligation to pay off that liability on exercise of the City's right of purchase.[17]

C. The State Courts' Ruling That the Phrase "Then Undistributed Corporate Surplus" in the Contract Meant "Retained Earnings" Does Not Violate Any Constitutional Provision.

PTC urges (Petition for Certiorari, pp. 27-31) that the Fourteenth Amendment was somehow violated because the state courts' ruling that "then undistributed corporate surplus" meant "retained earnings" allegedly lacked "fair support" in state law.[18] How this ruling rises to the level of a constitutional deprivation is not articulated. In any

17. A study used in a publication by the firm of one of PTC's accounting experts disclosed that only 17 out of 291 reporting companies had failed to make any provision for funding pension obligations (R. 1807-08).

18. PTC also suggests—without briefing the point—that this ruling, and the rulings extending the time of payment and holding that PTC had no right to bid on the assignment of the right of purchase violated Article I, § 10 of the Constitution by impairing PTC's contract. (Petition for Certiorari, pp. 7-8, Question 6.) This unfounded contention must fail because the Contract Clause's prohibition is applicable only against legislative action, while in this case all the challenged "impairments" resulted from the application of settled principles of state law by the state courts. *E.g., Tidal Oil Co. v. Flanagan*, 263 U. S. 444.

On the question of extension of time for performance under an option where one party has made performance impossible, see, *e.g., Unatin 7-Up Co. v. Solomon*, 350 Pa. 632, 39 A. 2d 835 (1944); *Sidle v. Kaufman*, 345 Pa. 549, 554, 29 A. 2d 77, 80 (1942); *Shattuck v. Cunningham*, 166 Pa. 368, 381, 31 Atl. 136, 141 (1895). On the question of a "right" to bid on the assignment of the right of purchase, for which the contract provided that PTC "may become a bidder," see, *e.g., Commonwealth v. A. M. Byers Co.*, 346 Pa. 555, 561, 31 A. 2d 530, 532, *cert. denied*, 320 U. S. 757 (1943); *Connell v. Kennett Twp. Bd.*, 356 Pa. 585, 589, 52 A. 2d 645, 647, *appeal dismissed*, 332 U. S. 748 (1947).

event, it is incorrect. PTC seeks to gain nourishment from several abstract definitions of the term "surplus" which were formulated in contexts wholly irrelevant to this case. The definitions could have no conceivable relevance here unless there were no evidence of what the parties meant by their use of the phrase "then undistributed corporate surplus." As the trial court demonstrated in its opinion (Pet. App., pp. 150-57a), the parties' intent was unmistakably clear: to return to PTC's stockholders such amounts as could have been distributed as a cash dividend, i.e., retained earnings. Under these circumstances, no other conclusion than that reached by the state courts with respect to the meaning of "then undistributed surplus" finds *any* support in state contract law, where it is a hornbook proposition that the intent of the parties is controlling.

D. No Question Appropriate for Review on Writ of Certiorari Is Presented by the State Court's Grant of a Preliminary Injunction, Now Expired, Prohibiting PTC From Commencing Suit in the Federal Courts Pending Disposition of the State Court Appeal Previously Taken by PTC.

In a final attempt to invoke this Court's jurisdiction, PTC contends that it was deprived of due process by a preliminary injunction, now expired, which prohibited it from circumventing the appellate jurisdiction of the Pennsylvania Supreme Court by filing a federal suit before PTC's state appeal had been decided.[19] It is clear that no question appropriate for review by this Court on writ of certiorari is raised by the grant of this temporary relief.

In the first place, the propriety of the preliminary injunction is now a moot question, since it has already ex-

19. The Resolution to file the federal court action was by an improperly constituted PTC Board of Directors and thus was without force or effect (See p. 13, fn. 9, *supra*).

pired and PTC, in fact, has stated that it *never* applied to the type of suit it wished to file and is now pursuing, without threat or fear of contempt, in the Federal District Court (PTC Complaint filed in C. A. 44348). It is well settled that an appeal becomes moot where it "cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U. S. 41, 42. Here, PTC is presently pressing its repetitious claims in the federal courts, and it would be meaningless to declare now that the preliminary injunction previously restraining such conduct was improper.

PTC attempts to avoid the problem of mootness by arguing that said injunction wrongfully barred it from "timely" access to the federal courts, and improperly vested the state court judgment with *res judicata* effect. What PTC overlooks, however, is that under Pennsylvania law, *res judicata* became applicable, even though an appeal was pending, when the final judgment of the state trial court was rendered on September 16, 1966—four months *before* the preliminary injunction was issued. The Pennsylvania rule is clear and definitive. *Wallace's Estate*, 316 Pa. 148, 153, 174 Atl. 397, 399 (1934), wherein the court said:

> "[W]hen a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, *until reversed*, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies. . . ." (Emphasis added.)

In *Makariw v. Rinard*, 222 F. Supp. 336, 338 (E. D. Pa. 1963), *rev'd on other grounds*, 336 F. 2d 333 (3rd Cir. 1964), the federal Court in Pennsylvania, applying Pennsylvania law, held:

> "The fact that an appeal is pending in the prior civil action does not mitigate against its effect as a final judgment. Pennsylvania recognizes a judgment as final until reversed."

Accord, Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 29, 131 A. 2d 622, 626 (1957), *cert. denied*, 355 U. S. 832; *Merchant's Ins. Co. v. DeWolf*, 33 Pa. 45 (1859); *Marsh v. Pier*, 4 Rawle 273, 288 (Pa. 1833). The federal law is the same, see 1B MOORE, FEDERAL PRACTICE, ¶ 0.416[3] at pp. 2252-54 (2d ed. 1965). Thus, if PTC had filed the suit in federal court at the time originally intended, the federal court would have been required to give conclusive effect to the final decree of September 16, 1966, even though an appeal was pending in the Supreme Court of Pennsylvania. *Makariw v. Rinard, supra*, at 338 fn. 1; see 28 USC § 1738. Since the final unreversed judgment of the Court of Common Pleas was *res judicata* before the issuance of the preliminary injunction challenged here, the question of the propriety of the injunction is now moot.

Moreover, the preliminary injunction complained of specifically granted PTC the opportunity at any time to have a hearing on whether such injunction should be made permanent (Pet. App. 231a). PTC never accepted this opportunity offered by the state court.

Finally, it is clear that the preliminary injunction was properly issued by the state court. In support of its contrary argument, PTC cites only the case of *Donovan v. City of Dallas*, 377 U. S. 408, which the Pennsylvania courts fully considered, and correctly found inapplicable, in following the decisions of this Court governing the case at bar.

The *Donovan* case dealt with the power of a state court to enjoin permanently parties to a completed state suit from prosecuting a similar federal action where the federal suit

had been filed, answered and dismissed in the federal district court prior to issuance of the injunction. Donovan had been held in contempt by the state courts merely for appealing to the United States Court of Appeals for the Fifth Circuit from a dismissal of the federal suit by the district court. The Texas State Court ordered Donovan to withdraw his appeal under pain of a contempt citation. In these circumstances, the jurisdiction of the federal court had attached and could not be defeated by the subsequent action of the state court, whose power over the subject matter had been exhausted by its final decision on the merits of the litigation. That this was vital to the decision of this Court is shown by the majority opinion which stated that "the heart of the rule . . . is that:

> 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . .'" 377 U. S. at 413, quoting *Peck v. Jenness*, 7 How. 612, 625.

Conversely, where a federal suit has not yet been started, and the state litigation is still being pursued on an appeal invoked by the very party who then files the federal suit, the state courts may prevent the subversion of their jurisdiction by temporarily enjoining the litigant before he files the federal suit while the state court is still considering the matter. As held by this Court in *Harkrader v. Wadley*, 172 U. S. 148, 164:

> "When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

Accord, Peck v. Jenness, supra. The injunction issued here by the state court merely recognized this settled principle, and was therefore proper.[20]

It is, therefore, clear that the issuance of the preliminary injunction does not pose any question warranting review by this Court.

IV.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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Dated: January 19, 1968.

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20. Thus, this Court has long recognized that a court whose jurisdiction has first been invoked has the right to prevent vexatious and duplicative litigation in another court until the first court has exhausted its jurisdiction. *E.g., Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44, 51-52; *Cole v. Cunningham,* 133 U. S. 107. *Accord, Trees v. Glenn,* 319 Pa. 487, 181 Atl. 579 (1935).

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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REPLY BRIEF.

Petitioners submit this Reply Brief in response to the Brief in Opposition of respondents, Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia (City).

Respondents' Brief in Opposition does not dispute that the Pennsylvania courts construed the purchase option between PTC and the City so that SEPTA's enforcement of the declaratory judgment will result in PTC's receiving so much less than the value of its assets that it is probable that PTC's stockholders will receive little or nothing for their capital investment. Respondents do not deny this truth.

The strategy which respondents have pursued ever since this unique judgment was entered has been to preclude the federal courts from considering the legal effect of this truth, which is that enforcement of the judgment will deprive PTC of its rights under the Constitution of the United States. This strategy first took the form of an injunction which enjoined PTC from bringing any federal court action during the pendency of the appeal to the Supreme Court of Pennsylvania. Respondents deliberately sought and obtained that injunction in violation of this Court's decision in *Donovan v. Dallas,* 377 U. S. 408 (1964), that state courts have no power to issue such an injunction.

Now that the judgment has been reviewed by the Supreme Court of Pennsylvania, respondents advance the argument that the injunction which they sought was redundant and therefore "harmless error" because, they assert, the decree of the Philadelphia court would in any event have been entitled to conclusive res judicata effect in

the federal district court even during the pendency of the appeal to the Pennsylvania Supreme Court, and therefore "the question of the propriety of the injunction is now moot".

This argument is specious because it has already been rejected by this Court in *Donovan v. Dallas,* 377 U. S. at 412-13. Moreover, it deliberately ignores the only Pennsylvania Supreme Court decision which is directly on point. In *Columbia National Bank v. Dunn,* 207 Pa. 548, 56 Atl. 1087 (1904), the Pennsylvania Supreme Court *held* that the pendency of an appeal from a decree dismissing a suit in equity precluded the assertion of that decree as a bar in an action-at-law.* The same holding was reached in *Robbins v. Crown,* 76 Montg. 51 (Pa. C. P. 1958). To the same effect, see *Bryar v. Campbell,* 177 U. S. 649, 654 (1900) (discussing Pennsylvania law); *Souter v. Baymore,* 2 Pa. 415 (1847) (following federal admiralty law); *Hugg v. Brown,* 6 Whart. 468 (Pa. 1841) (arbitral award not binding pending appeal); *Rankin v. Iron City Sand & Gravel Corp.,* 71 F. Supp. 26 (W. D. Pa. 1947) (dictum).

Whether or not federal constitutional issues litigated in federal-court actions are subject to state rules of res judicata, see *Williams v. Murdoch,* 330 F. 2d 745, 751 (3d Cir. 1964); *Boothe v. Baker Indus., Inc.,* 262 F. Supp. 168 (D. Del. 1966), the federal courts should not accord state-court decisions any more conclusive effect as to both state and federal law issues than those decisions bear under their own state law, *cf.* 28 U. S. C. § 1738. In finding that law the federal courts should rely on *holdings* of the state courts and not *obiter dicta* uttered in decisions with little or no

* For text authorities "that the pendency of an appeal from a [Pennsylvania] judgment prevents its operation as res judicata," see Annot., 9 A. L. R. 2d 984, 994-95 (1950); Am. Jur., *Judgments* § 341, at 385 n. 11 (1958); C. J. S., *Judgments* § 623 at 49 n. 71 (1947); *id.* § 701 (1967 Cum. Ann. Pock. Pt. at 40).

relation to the point in issue and which do not indicate any reasoned disagreement with previous state precedents. See *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198, 204 (1956); *West v. American Tel. & Tel. Co.*, 311 U. S. 223 (1940).

In both *Wallace's Estate*, 316 Pa. 148, 174 Atl. 397 (1934), and *Helmig v. Rockwell Mfg. Co.*, 389 Pa. 21, 131 A. 2d 622, *cert. denied*, 355 U. S. 832 (1957), cited by respondents, the prior judgments had already been affirmed on appeal. The quotation in *Wallace's Estate, supra*, 316 Pa. at 153, 174 Atl. at 399 (1934), quoted in respondent's brief, p. 27, is pure dictum from a decision which did not involve the point at issue, did not discuss or cite precedents to the contrary, nor did it indicate any reasoned disagreements with these precedents. *Helmig v. Rockwell Mfg. Co., supra*, 389 Pa. at 29, 131 A. 2d at 626, merely quotes the same language from *Wallace's Estate, supra*, again without relation to the facts of the case and to direct holdings to the contrary. *Makariw v. Rinard*, 222 F. Supp. 336, 338 (E. D. Pa. 1963) (Wood, J.), *rev'd on other grounds*, 336 F. 2d 333 (3d Cir. 1964), erroneously stated the Pennsylvania rule on this point, also quoting the dictum in *Wallace's Estate, supra*, and was reversed by the Third Circuit on a related point of the Pennsylvania res judicata rule. The older Pennsylvania cases cited by respondents preceded and must be understood to have been overruled by *Columbia Nat'l Bank v. Dunn*, 207 Pa. 548, 56 Atl. 1087 (1904), to the extent they are contrary.*

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* *Merchants Ins. Co. v. DeWolf*, 33 Pa. 45, 75 Am. Dec. 577 (1859), is also distinguishable in that it was an action to enforce a New York judgment, which under New York law was not stayed pending appeal and which law the Pennsylvania court was bound to respect. *Marsh v. Pier*, 4 Rawle 273, 288, 26 Am. Dec. 131 (Pa. 1833), is mere dictum, since the prior judgment there involved had not been appealed.

This belated argument should not be considered by this Court. Respondents obviously did not think that the judgment of the Court of Common Pleas barred PTC from litigating their rights in a federal court when they sought the injunction. They then thought, and correctly so, that res judicata would not attach until all appeals had been exhausted.

This Court should not grant respondents the benefit of this unlawful injunction by now denying certiorari with the result that all appeals will have been exhausted. It should, instead, either grant or withhold action on the writ as suggested in the petition to enable PTC to establish in the action now pending in the United States District Court for the Eastern District of Pennsylvania their federal rights which have been frustrated by respondents. The truth is that enforcement of the judgment will leave PTC's stockholders with little or no compensation at all for their capital investment in a profitable company and the United States Constitution prohibits an agency of the state from enforcing such a wholly confiscatory judgment.

Since some of the factual inaccuracies in respondents' brief may mislead the Court, they require correction here. First, respondents state that, "The core of the transit system is owned by the City." (P. 5). Petitioners are not seeking and have never sought compensation for the City's property or for any values flowing from the City's grant of franchises. The truth of the matter is, however, that the heart of the Philadelphia transit system is not the Broad Street subway, which the City owns, but the Market Street subway-elevated, the major and most important part of which is owned by PTC, and PTC's wholly-owned, city-wide bus transportation system, including buses and other rolling stock, real estate, shop

and other facilities and equipment which have a market value completely independent of the franchise rights. The City's investment in subway construction has been based on political considerations in which the removal of blighting influences have played at least as great a part as has the desire to develop an efficient transit system. There was certainly no subsidy granted PTC by the City, and indeed the Broad Street Subway is operated by PTC at a loss (Tr. 1010).

Secondly, respondents' statement that "neither PRT nor PTC was able or willing to finance the cost of a single major expansion of the transit system" (p. 8) deliberately ignores the fact that PTC has in the past several decades converted most of the former street railroad system into a bus system.

Thirdly, respondents' quotation in their Brief in Opposition, p. 9, from the statement of PTC's president before the City Council (R. 389), that "this litigation would make it virtually impossible to finance the acquisition of PTC by the option method", is taken out of context of the preceding sentence in which respondent SEPTA's counsel is quoted as stating "that even though the City Solicitor and SEPTA counsel believe the option is enforceable, they recognize that there are serious questions involved." Respondents' suggestion that this litigation was frivolously instigated by petitioners is belied by the statements of SEPTA's own counsel, which is also part of the Record before this Court.

Finally, respondents' brief maligns PTC, its directors and stockholders, for delays inherent in protecting their interests and presenting their legal position in this state court proceeding initiated by respondents and because of the stockholders' exercise of their right to reject a settlement after PTC's Board of Directors had accepted and

recommended that settlement (see Appendix D, pp. 174-75a). While irrelevant here, these comments do point up that the real issues in this litigation are the immediate personal rights of all of PTC's 14,000 public stockholders.

A state agency is here attempting to acquire PTC's assets by enforcing a state court judgment which is so confiscatory as to leave their stockholders little or nothing for their capital investment. Certainly the Constitution prohibits that. Certiorari should be granted.

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